SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 457.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

FREDERICK L. MERRIAM.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Frederick L. Merriam, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Frederick L. Merriam, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 3rd day of December, 1921, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of
2 Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

L. HAND,
U. S. District Judge.

3 *Summons.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF, against FREDERICK L. MERRIAM, DEFENDANT.	L 21–401.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney

within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 1st day of May, in the year one thousand nine hundred and twenty.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

FRANCIS G. CAFFEY,
United States Attorney, Plaintiff's Attorney, Office and Post Office Address, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

4 *Amended complaint*

United States District Court, Southern District of New York.

The plaintiff herein, by its attorney, Francis G. Caffey, United States attorney for the Southern District of New York, for its amended complaint, respectfully shows to this court and alleges, upon information and belief:

I. That the plaintiff is a corporation sovereign.

II. That the defendant is a resident of Tarrytown on the Hudson, in the county of Westchester and State of New York, and resides within the Southern District of New York.

III. That on May 7, 1915, one Alfred G. Vanderbilt, late of the city, county, and State of New York, died leaving a last will and testament which was duly admitted to probate by the surrogates' court of the county of New York on the 16th day of June, 1915, a copy of which said last will and testament is annexed hereto marked "Exhibit A," and made a part hereof.

5 IV. That the defendant duly qualified as an executor of, and as one of the trustees of the trusts created by, said last will and testament, and that letters testamentary were duly issued to him by said surrogates' court on said 16th day of June, 1915.

V. That during the calendar year 1915 defendant received the sum of two hundred and fifty thousand dollars ($250,000) given to him by said will.

VI. That the defendant did not, within four months from said 16th day of June, 1915, pursuant to the provisions of section 2753 of the Code of Civil Procedure of the State of New York, renounce said bequest to him of said two hundred and fifty thousand dollars ($250,000). That no commissions have been allowed or paid to the defendant under said section 2753 of the Code of Civil Procedure of the State of New York, which section contains the only provision in the laws of the State of New York prescribing the amount of

commission or other compensation that the courts of the State of New York may allow to executors of a will or to testamentary trustees upon the judicial settlement of their accounts.

VII. That said bequest of two hundred fifty thousand dollars ($250,000) so received as aforesaid by the defendant was under and pursuant to the terms of said last will and testament in lieu of all compensation or commissions to which defendant would otherwise be entitled as executor or trustee aforesaid, and was, therefore,

part of the gains, profits, and income received by or accrued
6 to defendant during the calendar year ending December 31, 1915, within the intent and meaning of the hereinafter mentioned act of Congress approved October 3, 1913.

VIII. That pursuant to the requirements of Section II of the act of Congress approved October 3, 1913 (38 Stat. 114, 166), the defendant filed on or about the 23rd day of February, 1916, with the collector of internal revenue for the third district of New York what purported to be a true and complete statement of the gains, profits, and income received by or accrued to the defendant during the calendar year ending December 31, 1915.

IX. That by reason of the failure and omission of the defendant to include in his said return of net income for the calendar year ending December 31, 1915, the said sum of two hundred and fifty thousand dollars ($250,000) received by him as aforesaid as part of the gains, profits, and income received by or accrued to him during the said calendar year, the said return so filed by him was incorrect, misleading, and false.

X. That the taxable net income of said defendant for said calendar year ending December 31, 1915, exclusive of said two hundred fifty thousand dollars ($250,000) received by him as aforesaid under said last will and testament, was seventeen thousand two hundred forty-five and 27/100 dollars ($17,245.27), and that his taxable net income inclusive of said sum was two hundred sixty-seven thousand two hundred forty-five and 27/100 dollars ($267,245.27), of which last mentioned amount two hundred fifty-five thousand two hundred fourteen and 2/100 dollars ($255,214.02) was subject to the

normal tax rate of 1%.

7 XI. That by reason of the aforesaid, the defendant became and is liable to pay to the United States of America an additional tax for said calendar year ending December 31, 1915, on the income of the defendant, which additional tax amounts to the sum of $10,912.26, said sum being the difference between the sum of $10,964.40, the tax legally due, and the sum of $52.14, the tax actually paid.

XII. That no part of said additional tax of $10,912.26 has been paid, although duly demanded, and that the same is now due and owing from said defendant to plaintiff, together with a penalty of 5% of the amount thereof and interest on the amount of said additional tax at the rate of 1% per month from the 30th day of June, 1916.

XIII. That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,912.26, together with a penalty of 5% of said sum and interest thereon at the rate of 1% per month from the 30th day of June, 1916, together with the costs and disbursements of this action.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and Post Office Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

8 STATE OF NEW YORK,
County of New York, } ss:
Southern District of New York,

Edward F. Unger, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York and as such has charge of this action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent instead of by plaintiff is that plaintiff is a corporation sovereign and that deponent is duly authorized to make the same.

That the sources of deponent's information and the grounds of his belief as to the matters stated to be alleged upon information and belief are certified copies of the tax return of defendant and communications and documents submitted by the Treasury Department of the United States.

EDWARD F. UNGER.

Sworn to before me this 2nd day of June, 1921.
[SEAL.]
CARL BRECHER,
Notary Public, Kings Co.

Clerk's No. 496, Register's No. 3178. N. Y. Clerk's No. 317. Register's No. 3840. Commission expires March 30, 1923.

9 *Exhibit A to amended complaint.*

Last will and testament of Alfred G. Vanderbilt.

I, Alfred G. Vanderbilt, of the city of New York, do hereby make, publish, and declare this my last will and testament, as follows:

First: I direct the executors of this my will, hereinafter named, to pay out of my estate all my funeral and testamentary expenses and all my just debts as soon after my decease as may be convenient.

Second: I give and bequeath to my beloved wife, Margaret Emerson Vanderbilt, the sum of two million dollars ($2,000,000) in cash,

or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of two million dollars ($2,000,000), with interest on said sum from the date of my decease to the date of the payment to her of such sum, or the transfer and assignment to her of such securities, as the case may be, at the rate of five per cent per annum, in full satisfaction and discharge of my covenants made and contained in the certain antenuptial agreement made and executed by and between us, my said wife, then Margaret Emerson McKim, and myself, at London, England, on the 15th day of December, 1911, and in lieu and discharge of her right of dower in or to my real estate, and of any other right of any nature or character, if any, that otherwise she might have in or to any part of my estate, real or personal (excepting her rights under the further provisions made for her in this my will), as provided in said agreement.

Also, I give and bequeath to my said wife, Margaret Emerson Vanderbilt, the further sum of one million dollars ($1,000,000) in cash, or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of one million dollars ($1,000,000), as and for her absolute property.

I give and bequeath to my said wife, Margaret Emerson Vanderbilt, my house boat "Venture."

Third: I give, devise, and bequeath to my said wife, Margaret Emerson Vanderbilt, my real estate known as "Sagamore Lodge," comprising about fifteen hundred and twenty-six (1,526) acres, and my real estate known as Camp "Kill-Kare," comprising about ten hundred and thirty (1,030) acres, and my real estate known as "Moose River Tract," comprising about two thousand (2,000) acres, and all my other real estate in the county of Hamilton in the State of New York, together with all personal property therein or thereon or used in connection therewith or appurtenant thereto, and all my lands, tenements, and hereditaments situated in England, and my leasehold of an apartment in the property known as Gloucester House, at Piccadilly and Park Lane, in London, England, together with all personal property therein or thereon or used in connection therewith or appurtenant thereto, excepting only moneys, stocks, bonds, or other securities.

Fourth: I give and bequeath to the executors of this my will the sum of five million dollars ($5,000,000) in cash, or, in the discretion of my said executors, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of five million dollars ($5,000,000), in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided: to collect and receive the income and profits from and of the principal thereof, and, after paying therefrom all proper expenses of the ad-

ministration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom, to pay over the balance of said income to my said wife, Margaret Emerson Vanderbilt, quarterly, for and during the term of her natural life; and upon her death, if and provided issue of us shall survive her, to pay over, assign, transfer and deliver the principal of said trust to and among such issue in such shares and proportions as she shall by her last will and testament direct and appoint, or, in default of such appointment, to and among our issue, in equal shares, per stirpes and not per capita.

Fifth: I give and bequeath to each and every child that
12 shall be born to me hereafter, either in my lifetime or after my death, lawful issue of me, the sum of one hundred thousand dollars ($100,000).

Sixth: Exercising the power of appointment given to me by the eleventh article of the will of my father, Cornelius Vanderbilt, I direct that the trust fund which is now held in trust for me under the provisions of said article of said will be paid over, assigned, transferred and delivered to my son William H. Vanderbilt.

Seventh: I give and bequeath to my son William H. Vanderbilt my coach known as the "Venture."

I give and bequeath to my son William H. Vanderbilt the protraits and bust bequeathed to me by the first article of the will of my father, Cornelius Vanderbilt, and the gold medal voted by the Congress of the United States to my great grandfather, Cornelius Vanderbilt, at the close of the War of the Rebellion in 1865, and which medal was bequeather to me by the sixteenth article of the will of my father. If my said son shall not survive me, then I give and bequeath said portraits and said bust and said gold medal to my brother, Cornelius Vanderbilt.

Eighth: I give, devise, and bequeath all my real estate known as "Oakland Farm," at Portsmouth, Rhode Island, and all the live stock and other personal property thereon or used in connection therewith or appurtenant thereto, to the executors of this my
13 will, in trust, nevertheless, to hold and to manage and to maintain the said property for the use of my son William H. Vanderbilt, and to permit him to occupy said farm as a place of residence, and to use said personal property during his minority, in such manner and upon such terms and conditions as may seem advisable to them, and, when he attains the age of twenty-one years, to convey, transfer, assign and deliver to him all the said real estate and so much of the said personal property as they shall not previously have sold or otherwise disposed of under the power hereinafter given to them, and if my said son dies before attaining the age of twenty-one years, then upon his death to convey, transfer, assign and deliver said real estate and said personal property to my oldest surviving son, if any; and if no son of mine be then living, to convey, transfer, assign and deliver all said property to and make the same a part of my residuary estate.

I direct that said real estate shall be kept intact and held as a single property during the minority, or until the death during his minority, of my said son William H. Vanderbilt, and that no part of it shall be sold or in any manner encumbered or disposed of.

I give and bequeath to my said executors securities, to be selected by them from the personal property, which I may own at the time of my decease, in such an amount as they in their discretion shall deem necessary for the purpose, in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided; to collect and receive
14 the income and profits from and of the principal of said trust, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom to apply, use or pay over, for the maintenance and upkeep of said Oakland Farm, so much of the balance of said income as shall be necessary in their judgment properly to maintain and keep the said property in good order and suitable condition, and to pay over any part that may remain of said balance of said income to and distribute the same among the beneficiaries of my residuary estate in the proportions in which they are entitled to have held in trust or to receive shares of the principal of my residuary estate, until my son William H. Vanderbilt shall attain the age of twenty-one years, or until his decease if he shall not attain the age of twenty-one years, and then to transfer, pay over and assign the principal of said trust to and make the same a part of my residuary estate.

I authorize my said executors, in their discretion, at any time during the term of said trust, to sell or otherwise dispose of any or all of the live stock or other personal property that may be on or used in connection with or appurtenant to said real estate, at public or private sale, and upon such terms and conditions as may seem advisable to them, and in the event they do make a sale or other disposition thereof, or of any part thereof, I direct that the proceeds of such sale or other disposition thereof be paid over and I give and bequeath the same to my son William H. Vanderbilt.

15 Ninth: If I leave surviving me daughters or a daughter, issue of my said wife Margaret Emerson Vanderbilt and myself, then and in that event I give and bequeath to my said executors cash, or, in their discretion, securities to be selected by them from the personal property which I may own at the time of my decease sufficient for the purpose, to hold two million dollars ($2,000,000) in cash, or, in their discretion, securities of the then market value of two million dollars ($2,000,000), in trust, nevertheless, for each such surviving daughter; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits thereof and, after paying all proper expenses of the administration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom, to apply so much

of the balance of said income as in the judgment of said trustees may be necessary to the support, maintenance, and education of said daughter for whom said principal is so held in trust, during her minority, accumulating meantime any surplus income; when she shall attain the age of twenty-one years to pay over to her all accumulations of said income; thereafter to pay over to her the entire balance of said income quarterly during her life; and upon her death to convey, assign, transfer, and pay over said principal of said trust to her surviving issue, in such shares and proportions as she shall by last will and testament appoint, and in default of such appointment, in equal shares, and in default of such surviving issue, then in
16 equal shares to her full brothers and full sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

Tenth: If I leave surviving me issue of a deceased son or of a deceased daughter of my said wife, Margaret Emerson Vanderbilt and myself, then and in that event I give and bequeath to such issue two million dollars ($2,000,000) in equal shares, per stirpes and not per capita.

Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

I give and bequeath to each of those persons who may be in my employ at my farm known as "Oakland Farm," at Portsmouth, Rhode Island, or on my properties known as "Sagamore Lodge," Camp "Kill-Kare," or "Moose River Tract," or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period.

17 Twelfth: All the rest, residue and remainder of my estate, real, personal and mixed (hereinafter referred to as "residuary estate"), wheresoever the same may be situated, I give, devise and bequeath to the executors of this my will, to divide the same into as many equal shares as I shall leave sons issue of my said wife, Margaret Emerson Vanderbilt, and myself surviving me, and to hold one of such shares, in trust, nevertheless, for each of our said sons; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits from and of the principal thereof, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable upon

or in respect to said trust fund or the income therefrom, to apply or pay over the balance of said income, hereinafter referred to as "net income," and to convey, assign, transfer and pay over said principal for the benefit of and to the use of said son for whom said share is so held in trust, as follows:

During his minority to apply to his support, maintenance and education so much of said net income as in the judgment of said trustees may be necessary, accumulating meantime any surplus income; when he shall attain the age of twenty-one years, to convey, assign, transfer and pay over to him all accumulations of income and one-quarter of the principal of said share; thereafter to pay over to him the net income of the remaining three-quarters of said share semiannually until he shall attain the age of twenty-five years, and then to convey, assign, transfer, and pay over to him another one-quarter of said share; thereafter to pay over to him the net income of the remaining one-half of said share semiannually until he shall attain the age of thirty years, and then to convey, assign, transfer, and pay over to him another one-quarter of said share; thereafter to pay over to him the net income of the remaining one-quarter of said share semiannually until he shall attain of age of thirty-five years, and then to convey, assign, transfer, and pay over to him the remaining one-quarter of said share.

In the event that I leave surviving me but one son issue of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my said residuary estate be held by my said executors, in trust as aforesaid, for such surviving son.

In the event that I do not leave surviving me a son but do leave surviving me daughters issue of my said wife, Margaret Emerson Vanderbilt, and myself, then and in that event I give, devise and bequeath my residuary estate to my said executors, to divide the same into as many equal parts as I shall leave daughters of my said wife, Margaret Emerson Vanderbilt, and myself surviving me (subject, however, to the provision hereinafter made for the issue of any of our children who may die before me), and to hold one of such shares, in trust nevertheless, as aforesaid, for each such surviving daughter.

In the event that I do not leave surviving me a son and do leave surviving me but one daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my residuary estate (subject, however, to the provision hereinafter made for the issue of any of our children who may die before me) be held by said executors, in trust as aforesaid, for such surviving daughter.

In the event that any one of my said sons or daughters for whom a share of my residuary estate or my residuary estate is held in trust as aforesaid shall die before attaining the age of thirty-five years leaving issue, then I give, devise and bequeath, the principal of said share, or of my entire residuary estate, as the case may be,

or so much of said principal as shall not previously have been conveyed, assigned, transferred and paid over to him or to her, to his or her surviving issue in such shares as he or she shall by last will and testament appoint, and in default of such appointment in equal shares, and in default of such surviving issue then in equal shares to his or her full brothers and or full sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a son but do leave surviving me daughters or a daughter, and issue of deceased sons or daughters or of a deceased son or daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then I give, devise, and bequeath to the surviving issue of each such deceased child in equal shares, per stirpes and not per capita, a share of my residuary estate equal in amount to the share so given, devised and bequeathed to my said executors in trust as aforesaid for each of my surviving daughters, or for my surviving daughter.

In the event that I do not leave surviving me a child issue of my said wife, Margaret Emerson Vanderbilt, and myself, but do leave surviving me lawful issue of a child or lawful issue of children of my said wife and myself, then, if there survive me such issue of but one such child, I give, devise and bequeath all my residuary estate to such issue in equal shares, per stirpes and not per capita; and if there survive me such issue of more than one such child, I give, devise and bequeath my residuary estate to the issue of such children in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my said residuary estate be held by my said executors, in trust as aforesaid, for my son William H. Vanderbilt. And in the event that any child of my said wife, Margaret Emerson Vanderbilt, and myself, who shall survive me shall die before attaining the age of thirty-five years without leaving issue or a full brother or full sister or issue of a full brother or full sister surviving him or her, then I direct that so much of my residuary estate so held in trust for him or her as shall not have been previously conveyed, assigned, transferred and paid over to him or her shall be held by my said executors, in trust as aforesaid, for my son William H. Vanderbilt, or, if he shall then have attained the age of thirty-five years, shall be conveyed, assigned, transferred and paid over to him as and for his absolute property.

In the event that in any of the contingencies mentioned in the immediately preceding paragraph of this my will my residuary estate or any part of my residuary estate shall be held by my said executors in trust for my son William H. Vanderbilt, and he shall die before attaining the age of thirty-five years, leaving issue, then I give, devise and bequeath so much of the

principal of said estate as shall not previously have been conveyed, assigned, transferred and paid over to him, to his surviving issue in such shares as he shall by last will and testament appoint, and in default of such appointment, in equal shares.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt, and myself, and my son William H. Vanderbilt does not survive me, but leaves issue surviving me, then I give, devise, and bequeath my residuary estate to such issue in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of a child, then I give, devise, and bequeath all my said residuary estate in equal shares to my brothers and sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

Thirteenth: I hereby give to the executors of this my will, as trustees of the trusts and of each of the trusts created by this my will, full power and authority, in their discretion, to sell, at public or private sale, at such times and places, and in such manner, and upon such terms and conditions as they shall deem expedient, or to lease or to rent or otherwise, dispose of, in such manner, for such periods and upon such terms and conditions as they shall deem expedient, any and all my real estate, wheresoever the same may be situated,
22 excepting only my said real estate known as "Oakland Farm," as well as any and all personal property, constituting a part of any such trust, and to execute and deliver any and all deeds, leases, or other instruments necessary or proper for the accomplishment of such purposes.

Also, I give to my said executors and trustees full power and authority to invest and reinvest the principal or any part of the principal of any trust fund created by this my will, and any income accumulated during the minority of a beneficiary, as aforesaid, in first mortgages on improved real estate situated within the city of New York; in bonds or stock of the city of New York; in bonds of the State of New York or in bonds of the United States of America; in first mortgage bonds or stock of any railroad company that continuously for a period of seven years has paid dividends of not less than five per cent per annum on its stock, or in mortgage bonds of any railroad company, payment of the principal and interest of which is guaranteed by any other railroad company that has paid such dividends for such period.

Further, if and in the event that any corporation or company whose stocks or securities constitute or are held as a part of the principal of any trust hereby created shall be reorganized or consolidated with any other corporation or company, or opportunity shall be offered to exchange any of its stocks or securities for other stocks or securities issued or to be issued by it, or for the stocks or securities or any other corporation or company, I give to my said executors and trustees full power and authority, in their dis-

23 cretion, upon such terms and conditions as they may deem advisable, to exchange any such stocks or securities so held by them for the stocks or other securities of any such reorganized or consolidated corporation or company, or for other stocks or securities of such corporation or company, or for stocks or other securities of any such corporation or company.

Also, I give to my said executors full power and authority, in their absolute discretion, to settle, compromise, or adjust any claim of any nature whatsoever that may be made or presented against my estate, upon such terms and conditions as they shall deem advisable and for the best interests of my estate, and I hereby expressly relieve them and each of them of any and all responsibility for any error of judgment or of fact that any beneficiary hereunder may consider them to have made in the making of such settlement, compromise, or adjustment.

If at the time of my death my father's estate shall not have been settled and distributed and I shall not have come into full possession of my final share thereof, I authorize my said executors to accept such share of my father's estate as shall be tendered to them by the executors of his will, and to make such settlement, compromise, or arrangement with respect to the amount or to the final receipt and delivery of the same as they may consider advisable; and I direct that no inventory, list, or accounting shall be required either in respect of my father's estate or of my estate, and I fully release my executors and trustees from any such inventory, list, appraisal, or accounting.

24 Fourteenth: I direct that any stock dividends that may be declared upon any of the stocks held as or constituting a part of any trust fund hereby created shall be treated as part of the income or profits thereof and shall be paid over to the person or persons entitled to such income or profits for the time being.

Fifteenth: I direct that my executors shall pay out of my residuary estate any and every inheritance, transfer, or legacy tax which shall be payable upon or under or on account of any gifts, devises, or bequests made by me in, or any rights of inheritance or transfer arising under, this my will by reason of such gifts, devices, or bequests, under the laws of the State of New York or of the United States or of any State therein or under the laws of any other country.

Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will.

I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.

Seventeenth: I hereby revoke any and all other and former wills and codicils by me at any time made.

25 In witness whereof, I have hereunto set my hand and affixed my seal this 16th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ALFRED G. VANDERBILT. [L. S.]

The foregoing instrument, consisting of this and fourteen other typewritten pages, was subscribed and sealed by the testator, Alfred G. Vanderbilt as, and was published and declared by him to be, his last will and testament, at New York City, New York, on the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen, in the presence of us and of each of us, and thereupon we, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

M. S. BARGER, *Newport, R. I.*
E. L. ROSSITER, *Greenwich, Conn.*
ROY C. GASSER, *Plandome, L. I.*

26 *Demurrer.*

United States District Court, Southern District of New York.

The defendant herein, by Roy C. Gasser, his attorney, demurs to the amended complaint of the plaintiff herein on the ground that it does not state facts sufficient to constitute a cause of action.

Wherefore, defendant demands judgment that the complaint herein be dismissed, with costs.

ROY C. GASSER,
Attorney for Defendant, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

27 *Opinion, Learned Hand, D. J.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA against REGINALD C. VANDERBILT.	L. 22–306.
UNITED STATES OF AMERICA against FREDERICK L. MERRIAM.	L. 21–401.
UNITED STATES OF AMERICA against HENRY B. ANDERSON.	L. 21–402.

The cases arise upon the demurrers to complaints at law to recover the income taxes upon certain legacies left the defendants under the will of Alfred G. Vanderbilt, who died in 1915. The will disposed

of a large estate, and set up various independent trusts of indefinite duration. The only parts relevant to these cases are the eleventh and sixteenth clauses, which read as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my
28 uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

* * * * * * *

"Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt; my uncle, Frederick W. Vanderbilt; Henry B. Anderson; Frederick M. Davies; and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will.

"I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

"The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants, so named as executors and trustees, qualified and have administered and are now administering the estate.

The question is whether the legacies so given are exempt as "bequests" or liable to the income tax as "compensation" for personal services.

29 Roy C. Gasser, for demurrants.

Edward F. Unger, C. T. Hendler, and Newton K. Fox, opposed.

LEARNED HAND, D. J.:

There seems to me no question whatever that these legacies in part anyway are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as executors and trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same. It is true that the form of the compensation is a "bequest," and a "bequest" is exempt; hence there is a verbal contradiction between one part of the statute and the other. Yet I can not doubt that all bequests are not exempt. Suppose, for instance, that a man agreed to leave another legacy if he would take care of him while he lived. The legacy would be a "bequest," but can anyone suppose that it would not be "compensation for personal services" which would be taxable?

The defendants argue that such legacies are payable though the executor do not complete his services. That is true. The English rule was that a legacy to an executor was presumably virtute officii and in recompense for his services and he must assent to his
30 appointment, Lewis v. Matthews, L. R. 8 Eq. 277. Yet very little was necessary, much less than formal qualification, Harrison v. Rowley, 4 Ves. 212. Indeed, in Brydges v. Wotten, 1 Ves. & Beam. 134, trustees were allowed their legacies though they had done nothing, probably because the legacies were payable before the trustees could qualify. If so, the rule does not truly apply to trustees. In America, where executors generally receive statutory commissions, such bequests have been spoken of as compensation which must be earned, Matter of Tilden, 44 Hun, 441; Renshaw v. Williams, 75 Md. 498. In some cases the language of the will apparently indicated as much, Harper's Appeal, 111 Pa. St. 243, or at least admitted of that interpretation, Richardson v. Richardson, 145 App. Div. 540. Morris v. Kent, 2 Ed. Ch. 175, much relied on by the defendants, decides nothing to the point, though the vice chancellor in his opinion quotes obiter the English rule that any indication of an assent to qualify is enough.

It seems to me to make no difference whether such bequests be regarded as payable merely on condition of qualification, or only after the services are rendered. I assume the first to be the correct rule, and certainly in the cases at bar the legacies were all payable long before the services could be completed, because there were trusts of indefinite duration, which might extend thirty years or more. The legacies were given with the chance that the executors and trustees might not complete their services. I regard the point, however, as immaterial because the bequests are in either case equally "compensation for personal services." Suppose a master pays
31 his servant in advance, trusting that he will live to complete. Is the hire not a "compensation for personal services"? It is prospective compensation, indeed, but none the less it is not gratuitous, it is given to procure and to pay for the services. At least, how can it be said that it is not compensation, if the servant enters and completes his employment?

Therefore, I attach no importance to the point of which so much is made, that the executor becomes entitled to his legacies on expressing his assent. More important is the opposite side of the same rule, that without such assent he does not become entitled. This rule is not because he gets the bequest eo nomine, it makes no difference that he is named in the will. Moreover, if the theory were that the bequest is given only to the office, he must qualify, which he need not. The condition that he must assent can only be because such bequests are treated as in recompense for his services, and so the books put it. He must at least undertake to perform while he can. If they were true legacies he would get them whether he qualified or not.

But, the defendants say, such bequests as these are in any case not all compensation; in part anyway they are from the testator's bounty. As to the defendants Merriam and Anderson there is not the least reason to suppose that they were not solely in compensation for their services. The commissions on this estate do not appear in the record, but the will shows that the estate itself was very large indeed. No one could possibly tell, not even the testator, what the commissions would be. It may be that they would be less to each ex-
32 ecutor and trustee than $200,000, and it may be that they would be more. Each defendant would get separate commissions as executor and second commissions also as trustee for so much as was in trust. He would also get commissions on the income of the trusts. Suppose, moreover, that the testator thought the legal commissions too little, and wanted to make sure that the defendants would qualify, so that his estate would certainly have their services. It is obviously impossible to say whether these bequests were in part bounty, even if the commissions should turn out much less.

As to the defendant Vanderbilt, I confess it seems scarcely possible that the testator did not mean the legacy to do more than compensate him for his services. He was a brother, and it seems unlikely that he was given the larger legacy to insure his qualifying or that the testator set that much more value to his services. Moreover, there is every reason to suppose that he would be the recipient of the testator's bounty. I have no question that had the testator been faced with the fact that his will in this form subjected the whole of his brother's legacy to taxes he would have changed it. But if he has in fact bequeathed the sum to him as compensation how can I apportion it partly as such and partly as free bounty? Clearly not, if the language be unambiguous. I can not substitute another expression, which I feel sure he would have used, had the consequences of his actual language been brought to his attention. I have already said that the language of the sixteenth clause seems to me to make the legacies compensation, and, if so, would it not contradict
33 that language to say that they were only in part compensation? The inequality in the bequests is not an inevitable sign that all might not have been so intended. The testator might think one executor's services to be worth more than another, and that what would secure one would not secure the other. I think the will means that all is to be compensation.

And if I were to say that the language was ambiguous what rule could a court or jury adopt to apportion the compensation? Granting that it would find that in part it was bounty, how could it say how much? It could not say that the bequests to the defendants, Anderson and Merriam, were the test, because if Vanderbilt is to be allowed to try the issue, so must they. If it were possible to make a division of the legacies based upon any words in the will, and, if, as I am for the moment assuming, the language used were ambiguous, then I can see how the issue might arise. But, granting

that it is ambiguous, there is no language through whose interpretation the legacies may me divided. That must be imputed into the will without any intimation from the testator at all, and the result would not be a will, but the creature of the court.

I therefore conclude that the whole of the legacies must be treated as compensation and that the demurrers must be overruled. Judgments will go on the complaints as prayed.

L. H., *D. J.*

AUGUST 6, 1921.

34 *Opinion, L. Hand, D. J., filed September 12, 1921.*

UNITED STATES OF AMERICA, vs. R. C. VANDERBILT. } 22–306.

UNITED STATES OF AMERICA, vs. H. B. ANDERSON. } L. 21–402.

UNITED STATES OF AMERICA, vs. F. L. MERRIAM. } L. 21–401.

In this case, as I said on my original opinion, the question was not argued at bar whether assuming that the legacies were in fact taxable they must be taxable altogether, I did consider that question, and decided that they were taxable in whole. Subsequent reflection has led me to doubt whether this is necessarily the case and I am therefore not prepared to give judgment absolute unless the defendants do not choose to answer over. It is in any case enough that the plaintiff is entitled to some relief; that being so the demurrers must be overruled. If, however, the defendants wish to insist that the legacies are taxable only in part, that part to be ascertained by reference to the amount given as compensation, assuming there is a way of dividing them, they must plead a partial defense.

35 I have, therefore, signed judgments respondeat over and the defendants may plead if they will. If they are content to rest their case upon the demurrers they can allow judgment absolute to pass against them at the expiration of the time to plead over.

Anything I said in my original opinion regarding the impossibility of dividing the legacies for the purpose of taxat'on must be regarded as not decided until some further argument.

L. HAND.

SEPTEMBER 12, 1921.

36 *Order overruling demurrer.*

At a stated term of the United States District Court held in and for the Southern District of New York, at the United States Courts and Post Office Building, Borough of Manhattan, city, county, and State of New York, on the 12th day of September, 1921.

Present: Honorable Learned Hand, United States district judge.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard by this court,

Now, after hearing Roy C. Gasser, Esq., of counsel for the defendant, in support of said demurrer, and Edward F. Unger, Esq.,
37 assistant United States attorney, of counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon, upon motion of William Hayward, United States attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered that said demurrer be, and the same hereby is, in all respects overruled, and it is

Further ordered that plaintiff have final judgment against the defendant for the sum of $10,912.26 with interest thereon at the rate of 6% per annum from the 30th day of June, 1916, and for its costs to be taxed.

LEARNED HAND, *U. S. D. J.*

38 *Judgment.*

United States District Court, Southern District of New York.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard before the Honorable Learned Hand, United States district judge, at a stated term of this court held on the 20th day of July, 1921, Roy C. Gasser, Esq., of counsel for the defendant, having been heard in support of said demurrer, and Edward F. Unger, Esq., assistant United States attorney for the Southern District of New York, of counsel for the plaintiff, having been heard in opposition thereto, and due deliberation having been had thereon, and the court having handed down its opinion and supplemental opinion on the 6th day of August, 1921, and the 12th day of September, 1921, respectively, overruling the said demurrer, and an order having been duly made and entered herein on the 12th day
39 of September, 1921, overruling said demurrer to the amended complaint of the plaintiff herein and ordering that the defendant have 20 days in which to plead to the complaint and that in the event of his failure so to do, plaintiff have judgment for the sum of $10,912.26, with interest at 6% from the 30th day of June, 1916, with costs, and the time of the defendant to plead to said

amended complaint having expired and no pleading having been interposed by the defendant, and the costs of the plaintiff having been taxed in the sum of

Now, on motion of William Hayward, United States attorney for the Southern District of New York, it is

Adjudged that the plaintiff have and recover of the defendant the sum of $10,912.26, together with the sum of $3,464.64, interest thereon, at the rate of 6% per annum, from the 30th day of June, 1916, together with the sum of $17.47 costs of the plaintiff as taxed, in all the sum of $14,394.37, fourteen thousand three hundred ninety-four and 37/100 dollars, and that plaintiff have execution against the defendant above named therefor.

Judgment signed this 15th day of October, 1921.

ALEX. GILCHRIST, JR., *Clerk.*

40 *Petition for writ of error.*

United States District Court for the Southern District of New York.

[Title omitted.]

And now comes the plaintiff in error, Frederick L. Merriam, by Roy C. Gasser, his attorney, and says that on the 15th day of October, 1921, this court entered judgment herein in favor of the defendant in error and against the plaintiff in error for the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37); and that in the judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff in error and whereby this plaintiff in error feels himself aggrieved, all of which will appear in more detail from the assignment of errors which is filed with this petition.

Wherefore the plaintiff in eror prays this court for an order allowing him to prosecute a writ of error in his behalf to the
41 honorable United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of under and according to the laws of the United States of America in that behalf made and provided, and that a transcript of the record, proceedings and papers of this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Second Circuit, and also that an order may be made fixing the amount of the security which the plaintiff in error shall give and furnish upon the said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray, etc.

Dated, November 4th, 1921.

FREDERICK L. MERRIAM,
By Roy C. Gasser,
Attorney for Plaintiff in Error, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

42 *Order allowing writ of error.*

At a stated term of the United States District Court for the Southern District of New York, held at the New York Post Office Building in the said district in the Borough of Manhattan, city of New York, on the 4th day of November, 1921.

Present: Honorable Learned Hand, United States district judge.

[Title omitted.]

Upon the 4th day of November, 1921, comes Frederick L. Merriam, by Roy C. Gasser, his attorney, and files herein and presents to this court his petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by him; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, and upon which this court
43 took and exercised jurisdiction, and upon which the judgment herein was rendered, duly authenticated, should be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and various proceedings may be had as may be just and proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff in error, Frederick L. Merriam, giving bond according to law in the sum of $16,000, which shall operate as a supersedeas bond.

It is accordingly

Ordered that a writ of error be, and the same is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore rendered herein on the 15th day of October, 1921, for the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37) and the actions and rulings of the court upon which said judgment was rendered; and it is

Further ordered that upon the making and filing with the clerk of this court of said bond all further proceedings be suspended and stayed until the final determination of such writ of error by the United States Circuit Court of Appeals for the Second Circuit and the coming down of the mandate of that court to this court.

L. HAND, *U. S. D. J.*

44 *Assignment of errors.*

United States District Court for the Southern District of New York.

[Title omitted.]

Now comes the plaintiff in error, Frederick L. Merriam, by Roy C. Gasser, his attorney, and in connection with his petition for a writ of error, says that in the record, proceedings of trial, and in the final judgment herein manifest error has intervened to the

prejudice of the plaintiff in error, and he assigns the following reasons, to wit:

(1) That the said United States District Court for the Southern District of New York erred in overruling the demurrer interposed by the plaintiff in error to the amended complaint filed in this action.

(2) The said court erred in holding that said amended complaint states facts sufficient to constitute a cause of action.

45 Wherefore, said Frederick L. Merriam, plaintiff in error herein, prays that the judgment entered in this cause in the office of the clerk of the United States District Court for the Southern District of New York, on or about the 15th day of October, 1921, in favor of the defendant in error and plaintiff below and against the plaintiff in error and defendant below, in the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37), because of error, be reversed, and the said District Court be directed to enter a judgment sustaining said demurrer and dismissing said amended complaint and for such other and further relief as to the court may seem just and proper.

ROY C. GASSER,

Attorney for Plaintiff in Error, Frederick L. Merriam, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

46 *Undertaking.*

In compliance with the order allowing writ of error made the 4th day of November, 1921, the plaintiff in error gave a bond in the sum of $16,000, as therein provided, of the Fidelity and Deposit Company of Maryland, which said bond was approved by Mr. Justice John C. Knox, D. J., on the 10th day of November, 1921, and filed in the office of the clerk of the United States District Court for the Southern District of New York on the 12th day of November, 1921.

47 *Citation.*

United States District Court for the Southern District of New York.

By the Honorable Learned Hand, one of the United States district judges for the Southern District of New York, in the Second Circuit, to United States of America, defendant in error, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the city of New York, in the district and circuit above named, on the 3rd day of December, 1921, pursuant to a writ of error filed in the clerk's office of

48 the District Court of the United States for the Southern District of New York, wherein Frederick L. Merriam is

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States the one hundred and forty-sixth.

L. HAND,
United States District Judge for the Southern District of New York, in the Second Circuit.

49 *Stipulation as to transcript.*

United States District Court, Southern District of New York.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 20th, 1922.

ROY C. GASSER,
Attorney for Plaintiff in Error.
WM. HAYWARD,
United States Attorney,
Attorney for Defendant in Error.

50 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

FREDERICK L. MERRIAM, PLAINTIFF IN ERROR,
(defendant below).
vs.
THE UNITED STATES, DEFENDANT IN ERROR,
(plaintiff below).

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

51 *Opinion.*

United States Circuit Court of Appeals for the Second Circuit.

No. 248–249. October Term, 1921.

Argued March 21, 1922. Decided April 3, 1922.

FREDERICK L. MERRIAM, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	In error to the District Court of the United States for the Southern District of New York. Before Hough, Manton, and Mayer, circuit judges.
HENRY B. ANDERSON, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	

Writ of error to the District Court for the Southern District of New York. Actions by the United States of America against
52 Frederick L. Merriam, defendant, and Henry B. Anderson, defendant, to recover an income tax under the income tax act of 1913 (38 Stat. 114, 116).

Roy C. Gasser, Esq., for plaintiffs in error.

Roy C. Gasser, Esq., William H. Hayes, Esq., of counsel.

William Hayward, Esq., U. S. atttorney for the Southern District of New York, for defendant in error.

Thomas J. Crawford, Esq., asst. U. S. attorney, P. C. Alexander, Esq., special attorney, Bureau of Internal Revenue, of counsel.

MANTON, Circuit Judge:

We shall refer to the parties herein as plaintiff and defendants, as below.

Plaintiff sued to recover an income tax claimed to be owing by each of the defendants, arising out of moneys received by them from the estate of Alfred G. Vanderbilt. After the service of an amended complaint, a demurrer was interposed and motions were made for judgments which resulted in judgment for the plaintiff in each of these actions.

Alfred G. Vanderbilt died May 7, 1915, leaving a will which was duly admitted to probate on June 16, 1915. In that will he made a bequest to each of the defendants. This article of his will reads as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to

Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars
53 ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

"I give and bequeath to each of those persons who may be in my employ at my farm known as 'Oakland Farm,' at Portsmouth, Rhode Island, or on my properties known as 'Sagamore Lodge,' Camp 'Kill-Kare,' or 'Moose River Tract,' or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period."

Article sixteenth thereof provides as follows:

"The bequests herein made to my said executors are in lieu of all compensation or commission to which they would otherwise be entitled as executors or trustee."

These bequests were paid to the defendants in 1915 in the due administration of the estate. The amended complaint recites that each bequest was received "as given to him by said will." Each of the defendants made a return of his income for taxation prior to March 15, 1916, and neither included in said return this legacy so received. Their positions rest upon the act of Congress then in force providing that "income of a taxable nature shall not include the value of property * * * acquired by bequest."

The statute provides in §11B for exemptions and deductions and that "net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and whatever form * * * or the transaction of any lawful business carried on for gain or profit or
54 gains or profits or anything derived from any source whatever including the income from but not the value of property acquired by gift, bequest, device, or descent."

Both of the defendants qualified as executors, as did the others named, excepting Mr. Davies, who died five days before the death of the testator and his legacy subsequently lapsed. The Commissioner of Internal Revenue made these legacies taxable as income, and the refusal to pay the assessment gave rise to these actions. The defendants contend that the bequests to them were legacies in the universally accepted and legal meaning of the term and as it is used in the income tax act. Further, that what was received is not taxable income because it was not given as consideration for services and was not derived from labor. (Merchants Trust Co. vs. Smietanka, 255 U. S. 509.) Income has been frequently described "as a gain derived from capital, from labor, or from both combined." (Stratton's Independence vs. Howbert, 231 U. S. 399.) And later, using

the same definition, the Supreme Court has said that income can be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. (Eisner vs. Macomber, 252 U. S. 189.) The conditional or unconditional voluntary disposition of personal property by will is a bequest. (Jessup's Redfield, §917, p. 1138.) A bequest in lieu of dower which is a legacy given conditional upon the surrender by the legatee of a right of dower has been held to be a bequest. (Orton vs. Orton, 3 Keyes, 486.) In the cited case the legacy was given in lieu of dower, and a provision was made that should there be a surplus in the estate after the payment of the legacies the legatee should share proportionately therein. The executors assumed the position that the widow was not entitled to any part of the surplus on the ground that a bequest in lieu of dower was not a legacy and that therefore she was not a legatee, but the court held that notwithstanding the bequest to the wife was declared to be in lieu of dower, it was still a legacy. "Such it was in
55 legal as well as common parlance and it was constantly called by that name in the books." Direction by the testator that his debts should be paid negatives the presumption that a bequest to a creditor is conditional upon a wavier of his claim and makes his legacy absolute. (Boughton vs. Flint, 74 N. Y. 476.) Bequests to executors or trustees in lieu of compensation for their services or "for their care and pain" have been held to be bequests in every acceptation of that term. And a legacy to an executor, even expressed to be "for care and pains," is not to be regarded in the light of a debt or as founded in contract or to be governed by principles applicable to contracts, for to do so would make the executor who undertook the discharge of his duties entitled to his legacy in preference to all other legacies even if there were a deficiency of assets to satisfy all of them, and a legatee of this description must abate equally with other legatees. (Morris vs. Kent, 2 Edwards Chancery, 179.) A will providing a bequest of $700 over and above any and all commissions to an executor entitled him to receive it (upon condition that the executor should accept and qualify) not as compensation for services and it was held not to abate with the genêral legacies. It was said to be a general legacy and subject to abatement. (Waters vs. Collins, 3 Dem. 374.) Lord Hardwicke in Heron vs. Heron (2 Atk. [English Reports, vol. 26, p. 507] 171) says that bequests to executors, "even though given expressly for care and pains, do not differ from general legacies so as to take them out of the ordinary rule in respect to abatement for deficiency of assets." Clayton vs. Akin (38 Ga. 320) held that one thousand dollars given and bequeathed "for extra trouble he may have had in executing this my will" was a legacy to the executor in every aspect of it, a general legacy, and as to abatement in case of a dificiency of assets must take its fate as such.

Bequests are either absolute or conditional, vested or contingent. It was not essential for the legatees named to qualify in order to

become entitled to their legacies. A bequest to one in lieu of compensation for his services which is conditional only upon his
56 willingness to qualify and serve if circumstances permit him to do so, is nevertheless a legacy. We must assume that Congress had in mind, by using the term "bequest" in the income tax law, to give to it that settled rule of construction well known and sanctioned by judicial decision. (Kepner vs. U. S., 195 U. S. 100.) "That presumption is resistless except against an intention imperatively clear." (Lynch vs. Turrish, 247 U. S. 221.) In interpreting statutes, levying taxes, it is the rule "not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out." (Gould vs. Gould, 245 U. S. 151.) The case differs from one where there is a provision in a will to pay a contractual obligation, a debt, which would be collectible even if the obligor did not provide for its payment by will, for there the money agreed to be paid would be acquired by contract and not by bequest. (In re Baker, 178 N. Y. 575; Matter of Vanderbilt, 184 App. Div. 661; In re Alfred G. Vanderbilt, 226 N. Y. 638.) Everything that comes is *is* not income taxable under the statute. (So. Pac. Co. vs. Lowe, &c., 247 U. S. 330.) It is clear that Congress intended the words "acquired by gift, bequest, devise, or descent" to be words of exception and not of exemption. The word "bequest" is used in the exemption clause of the act, and the act provides that income shall include all gains derived from compensation for personal services except property acquired by bequest. It is clear that it was the intent of the testator to give the legacy and not to permit the executors to work for it.

It is contended by the Government that article sixteenth of the will is in effect a testamentary fixing by the testator of the compensation to be paid for services to be rendered by his executors, but bequests are not compensatory, they are donative. The taxing statute intended something different. The compensation for personal services of whatever kind and in whatever form immediately follows and supplements the term "salaries" in the statute, which indi-
57 cates a periodical payment made as compensation for regular employment (Benedict vs. U. S., 176 U. S. 357) and wages which are generally applied for manual labor. (Matter of Stryker, 158 N. Y. 526.) We think Congress contemplated and intended to cover payments under contracts of employment expressed or implied and intended the taxing statute to reach all forms of payment for services rendered. But this does not affect the intention of Congress that the essential factor be present that whatever is sought to be taxed under the phrase must be a consideration for work performed or to be performed, and that it must be compensation derived from or flowing from labor. The income within the purview of the Constitution is defined to be a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained

through a sale or conversion of capital assets. (Eisner vs. McDonald; Straton's Independence, supra; Doyle vs. Mitchel Bros. Co., 247 U. S. 179.) A legacy acquired by bequest does not proceed from labor. The question must be determined, not by the phrase "in lieu of commissions" but upon the question of whether the bequest was in fact a consideration for services to be rendered. The bequests were not stipulated as a condition for service. As a general principle, if an executor unequivocally manifests an intention to act in the executorship, that will be a performance of the condition upon which his legacy depends, although he be prevented by circumstances from actually serving. (Williams on Executors, Sixth Am. Ed. Vol. II, 1394; Morris vs. Kent, supra; Scofield vs. St. John, 65 How. Pr. 292.) In the case of Brydges vs. Wotten (1 Ves. & Beam, 134) a legatee named as trustee and to whom the legacy was given as a token of regard and recompense for his trouble died nineteen months after the death of the testator, without having acted at all, and he was held to have become entitled to his legacy in the absence of any refusal or neglect to act. The rule of law is well settled that, where bequests are made conditional only upon being ready and willing to assume the executory office provided circumstances permit
58 them to do so, to entitle them to legacies it is not required of them that they should render services for which they would have a legal claim for compensation in the form of commissions. Inability of a legatee to enter upon performance of service as executor would not prevent the absolute vesting of a bequest in him in lieu of commission. (Bean vs. Carlton, 12 N. Y. Supp. 519, affd. 126 N. Y. 642; Wheeler v. Board, 12 Johns. 363.)

Assuming that the executors named had all died in a common disaster before the formalities of the probate of the will had been completed, could not their representatives respectively insist upon payment of the respective legacies? There is little doubt that the legacies would then have been acquired by bequest within the meaning of the law. We think the whole of each legacy was payable independent of services. It was an acquisition to each legatee by bequest within the meaning of the taxing act and was therefore not taxable as income.

Judgments reversed.

59-60 *Judgment.*

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York on the 10th day of April, one thousand nine hundred and twenty-two.

Present: Hon Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, circuit judges.

[Title omitted.]

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

C. M. H.
M. T. M.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

61 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 60, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Frederick L. Merriam, plaintiff in error, against United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 19th day of June, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the said United States the one hundred and forty-sixth.

[SEAL.] WM. PARKIN, *Clerk.*

62—64 *Writ of certiorari and return.*

(Filed Nov. 16, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Frederick L. Merriam is plaintiff in error and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York,

and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

65 In the Supreme Court of the United States.
October Term, 1922.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

JAMES M. BECK,
Solicitor General.
ROY C. GASSER,
Counsel for Respondent.

OCTOBER 30, 1922.

66–70 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 9, 1922.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, PETITIONER,
v.
FREDERICK L. MERRIAM, RESPONDENT. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit reversing a judgment heretofore rendered by the District Court of the United States for the Southern District of New York in favor of the United States and against Frederick L. Merriam.

STATEMENT OF THE CASE.

This is an action by the United States of America, hereinafter referred to as the plaintiff, against Frederick L. Merriam, hereinafter referred to as the defendant, for the recovery of $10,912.26, with penalty and interest, on account of additional income tax for the year 1915 under the provisions of the act

of October 3, 1913. The defendant is one of the executors of and trustees under the last will and testament of Alfred G. Vanderbilt, deceased. The sole question involved is whether a bequest in the sum of $250,000, expressly stated by the testator to have been made "in lieu of all compensation or commissions" to which defendant would otherwise be entitled as executor or trustee and received by the defendant during the year 1915, constituted taxable income within the meaning of the act of October 3, 1913.

The District Court overruled the demurrer to the amended complaint and held that the bequest in question was compensation fixed by the testator in lieu of the statutory compensation. The Circuit Court of Appeals for the Second Circuit upon writ of error to the District Court reversed the judgment of the District Court.

SECTION OF THE STATUTE INVOLVED.

Section II of the act of October 3, 1913 (38 Stat. 114–166), provides:

> A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * a tax of 1 per centum per annum * * *.
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries,

wages, or compensation for personal service of whatever kind and in whatever form paid, * * * or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.

REASONS FOR GRANTING PETITION.

1. The court erred in holding that the bequest to the defendant was not compensation for the services to be rendered by him as executor and trustee.

2. The court erred in holding that the bequest to the defendant was not taxable income within the meaning of the act.

3. The question is of importance not only by reason of the fact that it is determinative of a number of income tax cases pending in the courts, but also by reason of the fact that the ruling affects all of the revenue acts where the substance of the provision in question has been retained.

BRIEF IN SUPPORT OF PETITION.

It is well settled by many decisions in this country that a bequest to an executor "in lieu of commissions" constitutes a testamentary fixing of the compensation to be paid the executor for the work, labor, and services to be performed by him.

Fletcher v. *Hurd*, 14 N. Y. Supplement, 388.
Matter of Accounting of Mason, 98 N. Y. 527.
Matter of Tilden, 44 Hun. 441.
Matter of Vanderbilt, 68 App. Div. 27.
Renshaw v. *Williams*, 75 Md. 498.

Sinnott v. *Kenaday*, 14 A. C. (D. C.) 1, 24.
In re Sweatman's Estate, 223 Pa. 552.
(Reversed on other grounds 179 U. S. 696.)

In *Fletcher* v. *Hurd* (14 N. Y. Supplement, 388) the court held that a bequest of the residue to executors "to be divided equally between them *in lieu of compensation* for their services in the execution of their trust" was intended as compensation and that a person designated as executor who failed to qualify was not entitled to share in the bequest. To hold otherwise, the court said, would "convert a bequest in compensation for services into an absolute individual gift."

In the *Matter of Accounting of Mason* (98 N. Y. 527) the Court of Appeals of the State of New York said respecting a bequest of the residue given to the executors without qualifying words:

> This bequest was not intended for the specific compensation mentioned in section 2737 of the code. There is no language in the will indicating that it was meant to be *in lieu of commissions*.

The very language upon the absence of which the decision in that case turned is present here.

In *Renshaw* v. *Williams* (75 Md. 498) the court said:

> There is no doubt that the legacy was given to Mr. Williams not as a gratuity, and not unconditionally, but in lieu of commissions as executor. Upon this subject the will is explicit. * * * That legacy was given as a payment for all the labor and services which

> Mr. Williams might perform in completely settling Mrs. Conine's whole personal estate. * * * where he has been bequeathed *in lieu of commissions* a larger legacy than the commissions would amount to, and does, as administrator *pendente lite*, only that which he was bound to do as executor, the legacy must be treated as a full compensation for all the labor it was intended to cover, namely, the entire administration of the whole estate.

In the case of *Sweatman's Estate* (223 Pa. 552) the testator provided in his will that each of the three executors should receive $6,000 "in lieu of all commissions." The court, in holding the personal representative of one of the executors who died before fully performing the services as such executor to be entitled to the bequest, said:

> His death did not deprive his estate of his right to *what had been earned* and it was *in lieu of* that compensation that he was given his legacy. It must be presumed * * * that the testator had in mind the possibility that death might reduce the number of his executors and that he considered such a contingency when he fixed *the compensation to be paid* to each of them.

The cases cited by the Circuit Court of Appeals in support of the conclusions reached by it are based upon the English rule which holds a fiduciary office to be an honorary one and requires the incumbent to serve gratuitously. This rule obtained in this country until changed by statute. (See *Manning* v.

Manning, 1 Johnson's, Ch. 527.) In practically every State of the United States, however, including New York, compensation is now provided by statute for executors, trustees, and other fiduciaries. The reason for the rule thus fails, and with it the rule itself.

In providing that the value of property acquired by bequest should not be included in net income, Congress did not intend to exempt from taxation compensation for personal services paid in the form of a bequest. This appears from the express language of the act, including in its definition of income "compensation for personal service of whatever kind and *in whatever form paid*." There is to be found in the clause in question no legislative intent to exclude from taxation bequests given as compensation for services rendered or to be rendered.

Furthermore, it is settled that in its general acceptation "bequest" denotes a bounty or gratuity and not payment. In *Reynolds* v. *Robinson* (82 N. Y. 103) the Court of Appeals said:

> A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words, would be to contradict by oral evidence the legal effect of the written instrument and would violate the policy of the statute of wills.

In *Disston et al.* v. *McClain* (147 Fed. 114) the court defined a legacy as follows:

> Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the

> personal estate of an intestate, so a legacy is a definite *gift* by will of personal property either general and pecuniary, or specific.

That the word "bequest" was used in that sense in the act is also apparent from a reference to the words "gift" and "descent" with which it is associated in the clause in question. Contrasting the word "bequest" with the provision which defines income as including "compensation for personal service * * * *in whatever form paid*" resolves the doubt, if any exists.

Congress in providing that a "bequest" should not be included as income used the term in the sense in which it is generally understood and did no more in enacting the clause in question than point out that receipts not derived from capital or labor or both combined do not constitute income. As, under the authorities, the bequest received by the defendant is compensation fixed by the testator for the services to be rendered by the defendant as executor and trustee, it clearly constitutes taxable income, the form of payment by express mandate of Congress being immaterial.

It is, therefore, respectfully submitted that a writ of certiorari should issue and the judgment of the Circuit Court of Appeals for the Second Circuit be reviewed, to the end that it may be reversed and the judgment of the District Court reinstated.

JAMES M. BECK,
Solicitor General.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 458.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

HENRY B. ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the district court, before you, or some of you, between Henry B. Anderson, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Henry B. Anderson, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 3rd day of December, 1921, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the
2 Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States the one hundred and forty-sixth.

ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

[SEAL.]

The foregoing writ is hereby allowed.

L. HAND,
U. S. District Judge.

3 *Summons.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
HENRY B. ANDERSON, DEFENDANT. } L. 21–402.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within

twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 1st day of May, in the year one thousand nine hundrd and twenty.

[SEAL] ALEXANDER GILCHRIST, Jr.,
Clerk.

FRANCIS G. CAFFEY,
United States Attorney, Plaintiff's Attorney; Office and Post Office Address, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

4 *Amended complaint.*

United States District Court, Southern District of New York.

The plaintiff herein, by its attorney, Francis G. Caffey, United States attorney for the Southern District of New York, for its amended complaint, respectfully shows to this court and alleges, upon information and belief:

I. That the plaintiff is a corporation sovereign.

II. That the defendant is a resident of the Borough of Manhattan, city of New York, and resides within the Southern District of New York.

III. That on May 7, 1915, one Alfred G. Vanderbilt, late of the city, county, and State of New York, died leaving a last will and testament which was duly admitted to probate by the surrogates' court of the county of New York on the 16th day of June, 1915, a copy of which said last will and testament is annexed hereto marked "Exhibit A" and made a part hereof.

5 IV. That the defendant duly qualified as an executor of, and as one of the trustees of the trusts created by said last will and testament, and that letters testamentary were duly issued to him by said surrogates' court on said 16th day of June, 1915.

V. That during the calendar year 1915, the defendant received the sum of two hundred thousand dollars ($200,000) given to him by said will.

VI. That the defendant did not, within four months from said 16th day of June, 1916, pursuant to the provisions of section 2753 of the Code of Civil Procedure of the State of New York, renounce said bequest to him of said two hundred thousand dollars ($200,000). That no commissions have been allowed or paid to the defendant under said section 2753 of the Code of Civil Procedure of the State of New York, which section contains the only provisions in the laws of the State of New York prescribing the amount of commission or other compensation that the courts of the State of New York may

allow to executors of a will or to testamentary trustees upon the judicial settlement of their accounts.

VII. That said bequest of two hundred thousand dollars ($200,000) so received as aforesaid by the defendant was under and pursuant to the terms of said last will and testament in lieu of all compensation or commissions to which defendant would otherwise be entitled as executor or trustee aforesaid, and was therefore part of the gains, profits, and income received by or accrued to
6 defendant during the calendar year ending December 31, 1915, within the intent and meaning of the hereinafter mentioned act of Congress approved October 3, 1913.

VIII. That pursuant to the requirements of Section II of the act of Congress approved October 3, 1913 (38 Stat. 114, 116), the defendant filed on or about the 23d day of February, 1916, with the collector of internal revenue for the third district of New York what purported to be a true and complete statement of the gains, profits, and income received by or accrued to the defendant during the calendar year ending December 31, 1915.

IX. That by reason of the failure and ommission of the defendant to include in his said return of net income for the calendar year ending December 31, 1915, the said sum of two hundred thousand dollars ($200,000) received by him as aforesaid as part of the gains, profits, and income received by or accrued to him during the said calendar year, the said return so filed by him was incorrect, misleading, and false.

X. That the taxable net income of said defendant for said calendar year ending December 31, 1915, exclusive of said two hundred thousand dollars ($200,000) received by him as aforesaid under said last will and testament, was the sum of five thousand one hundred and twenty-one and 80/100 ($5,121.80), and that his taxable net income inclusive of said sum was two hundred five thousand one hundred and twenty-one and 80/100 dollars ($205,121.80), of which last-mentioned amount two hundred one thousand one
7 hundred twenty-one and 80/100 dollars ($201,121.80) was subject to the normal tax of 1%.

XI. That by reason of the aforesaid, the defendant became and is liable to pay to the United States of America an additional tax for the said calendar year ending December 31, 1915, on the income of the defendant, which additional tax amounts to the sum of $7,754.87, the said sum being the difference between the sum of $7,766.09, the tax legally due, and the sum of $11.22, the tax actually paid.

XII. That no part of said additional tax of $7,754.87 has been paid, although duly demanded, and that the same is now due and owing from said defendant to plaintiff, together with a penalty of 5% of the amount thereof and interest on the amount of said additional tax at the rate of 1% per month from the 30th day of June, 1916.

XIII. That the commissioner of internal revenue authorizes and sanctions these proceedings.

Wherefore plaintiff demands judgment against the defendant in the sum of $7,754.87, together with a penalty of 5% of said sum and interest thereon at the rate of 1% per month from the 30th day of June, 1916, together with the costs and disbursements of this action.

FRANCIS G. CAFFEY,

United States Attorney for the Southern District of New York, Attorney for Plaintiff; Office and Post Office Address, United States Court and Post Office Building, Borough of Manhattan, City of New York.

8 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Edward F. Unger, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York and as such has charge of the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent instead of by plaintiff is that plaintiff is a corporation sovereign and that deponent is duly authorized to make the same.

That the sources of deponent's information and the grounds of his belief as to the matters stated to be alleged upon information and belief are certified copies of the tax return of defendant, and communications and documents submitted by the Treasury Department of the United States.

EDWARD F. UNGER.

Sworn to before me this 2 day of June, 1921.
[SEAL.]

CARL BRECHER,
Notary Public, Kings County.

Clerk's No. 496. Register's No. 3178. N. Y. Clerk's No. 317. Reg's No. 3840. Commission expires March 30, 1923.

9 *Exhibit A to amended complaint.*

Last will and testament of Alfred G. Vanderbilt.

I, Alfred G. Vanderbilt, of the city of New York, do hereby make, publish and declare this my last will and testament, as follows:

First: I direct the executors of this my will, hereinafter named, to pay out of my estate all my funeral and testamentary expenses and all my just debts as soon after my decease as may be convenient.

Second: I give and bequeath to my beloved wife, Margaret Emerson Vanderbilt, the sum of two million dollars ($2,000,000) in cash,

or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of two million dollars ($2,000,000), with interest on said sum from the date of my decease to the date of the payment to her of such sum, or the transfer and assignment to her of such securities, as the case may be, at the rate of five per cent per annum, in full satisfaction and discharge of my covenants made and contained in the certain ante-nuptial agreement made and executed by and between us, my said wife, then Margart Emerson McKim, and myself, at London, England, on the 15th day of December, 1911, and in lieu and discharge of her right of dower in or to my real estate, and of any other right of any nature or character, if any, that otherwise she might have in or to any part of my estate, real or personal (excepting her rights under the further provisions made for her in this my will), as provided in said agreement.

Also, I give and bequeath to my said wife, Margaret Emerson Vanderbilt, the further sum of one million dollars ($1,000,000) in cash, or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of one million dollars ($1,000,000), as and for her absolute property.

I give and bequeath to my said wife, Margaret Emerson Vanderbilt, my house boat "Venture."

Third: I give, devise and bequeath to my said wife, Margaret Emerson Vanderbilt, my real estate known as "Sagamore Lodge," comprising about fifteen hundred and twenty-six (1,526) acres, and my real estate known as Camp "Kill-Kare," comprising about ten hundred and thirty (1,030) acres, and my real estate known as "Moose River Tract," comprising about two thousand (2,000) acres, and all my other real estate in the county of Hamilton in the State of New York, together with all personal property therein and thereon or used in connection therewith or appurtenant thereto, and all my lands, tenements and hereditaments situated in England, and my leasehold of an apartment in the property known as Gloucester House, at Piccadilly and Park Lane, in London, England, together with all personal property therein or thereon or used in connection therewith or appurtenant thereto, excepting only moneys, stocks, bonds or other securities.

Fourth: I give and bequeath to the executors of this my will the sum of five million dollars ($5,000,000) in cash, or, in the discretion of my said executors, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of five million dollars ($5,000,000), in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided; to collect and receive the income and profits from and of the principal thereof, and, after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly pay-

able upon or in respect to said trust fund or the income therefrom, to pay over the balance of said income to my said wife, Margaret Emerson Vanderbilt, quarterly, for and during the term of her natural life; and upon her death, if and provided issue of us shall survive her, to pay over, assign, transfer and deliver the principal of said trust to and among such issue in such shares and proportions as she shall by her last will and testament direct and appoint, or, in default of such appointment, to and among our issue, in equal shares, per stirpes and not per capita.

Fifth: I give and bequeath to each and every child that
12 shall be born to me hereafter, either in my lifetime or after my death, lawful issue of me, the sum of one hundred thousand dollars ($100,000).

Sixth: Exercising the power of appointment given to me by the eleventh article of the will of my father, Cornelius Vanderbilt, I direct that the trust fund which is now held in trust for me under the provisions of said article of said will be paid over, assigned, transferred and delivered to my son William H. Vanderbilt.

Seventh: I give and bequeath to my son William H. Vanderbilt my coach known as the "Venture."

I give and bequeath to my son William H. Vanderbilt the portraits and bust bequeathed to me by the first article of the will of my father, Cornelius Vanderbilt, and the gold medal voted by the Congress of the United States to my great grandfather, Cornelius Vanderbilt, at the close of the War of the Rebellion in 1865, and which medal was bequeathed to me by the sixteenth article of the will of my father. If my said son shall not survive me, then I give and bequeath said portraits and said bust and said gold medal to my brother, Cornelius Vanderbilt.

Eighth: I give, devise and bequeath all my real estate known as "Oakland Farm," at Portsmouth, Rhode Island, and all the live stock and other personal property thereon or used in connection therewith or appurtenant thereto, to the executors of this my
13 will, in trust, nevertheless, to hold and to manage and to maintain the said property for the use of my son William H. Vanderbilt, and to permit him to occupy said farm as a place of residence, and to use said personal property during his minority, in such manner and upon such terms and conditions as may seem advisable to them, and, when he attains the age of twenty-one years, to convey, transfer, assign and deliver to him all the said real estate and so much of the said personal property as they shall not previously have sold or otherwise disposed of under the power hereinafter given to them, and if my said son dies before attaining the age of twenty-one years, then upon his death to convey, transfer, assign and deliver said real estate and said personal property to my oldest surviving son, if any; and if no son of mine be then living, to convey, transfer, assign and deliver all said property to and make the same a part of my residuary estate.

I direct that said real estate shall be kept intact and held as a single property during the minority, or until the death during his minority, of my said son William H. Vanderbilt, and that no part of it shall be sold or in any manner encumbered or disposed of.

I give and bequeath to my said executors securities, to be selected by them from the personal property, which I may own at the time of my decease, in such an amount as they in their discretion shall deem necessary for the purpose, in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided; to collect and
14 receive the income and profits from and of the principal of said trust, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom to apply, use or pay over, for the maintenance and upkeep of said Oakland Farm, so much of the balance of said income as shall be necessary in their judgment properly to maintain and keep the said property in good order and suitable condition, and to pay over any part that may remain of said balance of said income to and distribute the same among the beneficiaries of my residuary estate in the proportions in which they are entitled to have held in trust or to receive shares of the principal of my residuary estate, until my son William H. Vanderbilt shall attain the age of twenty-one years, or until his decease if he shall not attain the age of twenty-one years, and then to transfer, pay over and assign the principal of said trust to and make the same a part of my residuary estate.

I authorize my said executors, in their discretion, at any time during the term of said trust, to sell or otherwise dispose of any or all of the live stock or other personal property that may be on or used in connection with or appurtenant to said real estate, at public or private sale, and upon such terms and conditions as may seem advisable to them, and in the event they do make a sale or other disposition thereof, or of any part thereof, I direct that the proceeds of such sale or other disposition thereof be paid over and I give and bequeath the same to my son William H. Vanderbilt.

15 Ninth: If I leave surviving me daughters or a daughter, issue of my said wife Margaret Emerson Vanderbilt and myself, then and in that event I give and bequeath to my said executors cash, or, in their discretion, securities to be selected by them from the personal property which I may own at the time of my decease sufficient for the purpose, to hold two million dollars ($2,000,000) in cash, or, in their discretion, securities of the then market value of two million dollars ($2,000,000), in trust, nevertheless, for each such surviving daughter; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits thereof and, after paying all proper expenses of the administration of said trust and all taxes of any kind properly payable

upon or in respect to said trust fund or the income therefrom, to apply so much of the balance of said income as in the judgment of said trustees may be necessary to the support, maintenance and education of said daughter for whom said principal is so held in trust, during her minority, accumulating meantime any surplus income; when she shall attain the age of twenty-one years to pay over to her all accumulations of said income; thereafter to pay over to her the entire balance of said income quarterly during her life; and upon her death to convey, assign, transfer and pay over said principal of said trust to her surviving issue, in such shares and proportions as she shall by last will and testament appoint, and in default of such appointment, in equal shares, and in default of such surviving issue, then in equal shares to her full brothers and full sisters
16 and the issue of any of them that may be then deceased in equal shares, per stirpes and not per capita.

Tenth: If I leave surviving me issue of a deceased son or of a deceased daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then and in that event I give and bequeath to such issue two million dollars ($2,000,000) in equal shares, per stirpes and not per capita.

Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

I give and bequeath to each of those persons who may be in my employ at my farm known as "Oakland Farm," at Portsmouth, Rhode Island, or on my properties known as "Sagamore Lodge," Camp "Kill-Kare," or "Moose River Tract," or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period.

17 Twelfth: All the rest, residue and remainder of my estate, real, personal, and mixed (hereinafter referred to as "residuary estate"), wheresoever the same may be situated, I give, devise, and bequeath to the executors of this my will, to divide the same into as many equal shares as I shall leave sons issue of my said wife, Margaret Emerson Vanderbilt, and myself surviving me, and to hold one of such shares, in trust, nevertheless, for each of our said sons; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits from and of the principal thereof, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable

upon or in respect to said trust fund or the income therefrom, to apply or pay over the balance of said income, hereinafter referred to as "net income," and to convey, assign, transfer, and pay over said principal for the benefit of and to the use of said son for whom said share is so held in trust, as follows:

During his minority to apply to his support, maintenance, and education so much of said net income as in the judgment of said trustees may be necessary, accumulating meantime any surplus income; when he shall attain the age of twenty-one years, to convey, assign, transfer, and pay over to him all accumulations of income and one-quarter of the principal of said share: thereafter to pay over to him the net income of the remaining three quarters of said share semiannually until he shall attain the age of twenty-five years,
and then to convey, assign, transfer, and pay over to him an-
18 other one-quarter of said share; thereafter to pay over to
him the net income of the remaining one-half of said share semiannually until he shall attain the age of thirty years, and then to convey, assign, transfer, and pay over to him another one-quarter of said share; thereafter to pay over to him the net income of the remaining one-quarter of said share semiannually until he shall attain of age of thirty-five years, and then to convey, assign, transfer, and pay over to him the remaining one-quarter of said share.

In the event that I leave surviving me but one son, issue of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my said residuary estate be held by my said executors, in trust as aforesaid, for such surviving son.

In the event that I do not leave surviving me a son but do leave surviving me daughters, issue of my said wife, Margaret Emerson Vanderbilt, and myself, then and in that event I give, devise, and bequeath my residuary estate to my said executors, to divide the same into as many equal parts as I shall leave daughters of my said wife, Margaret Emerson Vanderbilt, and myself surviving me (subject, however, to the provision hereinafter made for the issue of any of our children who may die before me), and to hold one of such shares, in trust nevertheless, as aforesaid, for each such surviving daughter.

In the event that I do not leave surviving me a son and do leave surviving me but one daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my residuary estate (subject, however, to the provision hereinafter made for the issue
of any of our children who may die before me) be held by
19 my said executors, in trust as aforesaid, for such surviving
daughter.

In the event that any one of my said sons or daughters for whom a share of my residuary estate or my residuary estate is held in trust as aforesaid shall die before attaining the age of thirty-five years leaving issue, then I give, devise, and bequeath the principal of said share, or of my entire residuary estate, as the case may be, or so much of said principal as shall not previously have been conveyed, as-

signed, transferred, and paid over to him or to her, to his or her surviving issue in such shares as he or she shall by last will and testament appoint, and in default of such appointment in equal shares, and in default of such surviving issue then in equal shares to his or her full brothers or full sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a son but do leave surviving me daughters or a daughter, and issue of deceased sons or daughters or of a deceased son or daughter of my said wife, Margaret Emerson Vanderbilt and myself, then I give, devise, and bequeath to the surviving issue of each such deceased child in equal shares, per stirpes and not per capita, a share of my residuary estate equal in amount to the share so given, devised, and bequeathed to my said executors in trust as aforesaid for each of my surviving daughters or for my surviving daughter.

In the event that I do not leave surviving me a child, issue of my said wife, Margaret Emerson Vanderbilt and myself, but do leave surviving me lawful issue of a child or lawful issue of chil-
20 dren of my said wife and myself, then, if there survive me such issue of but one such child, I give, devise, and bequeath all my residuary estate to such issue in equal shares, per stirpes and not per capita; and if there survive me such issue of more than one such child, I give, devise, and bequeath my residuary estate to the issue of such children, in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt and myself, then I direct that all my said residuary estate be held by my said executors in trust as aforesaid for my son William H. Vanderbilt. And in the event that any child of my said wife, Margaret Emerson Vanderbilt, and myself, who shall survive me shall die before attaining the age of thirty-five years without leaving issue or a full brother or full sister or issue of a full brother or full sister surviving him or her, then I direct that so much of my residuary estate so held in trust for him or her as shall not have been previously conveyed, assigned, transferred, and paid over to him or her shall be held by my said executors in trust as aforesaid for my son William H. Vanderbilt, or, if he shall then have attained the age of thirty-five years, shall be conveyed, assigned, transferred, and paid over to him as and for his absolute property.

In the event that in any of the contingencies mentioned in the immediately preceding paragraph of this my will my residuary estate or any part of my residuary estate shall be held by my said
21 executors in trust for my son William H. Vanderbilt, and he shall die before attaining the age of thirty-five years, leaving issue, then I give, devise, and bequeath so much of the principal of said estate as shall not previously have been conveyed, assigned, transferred, and paid over to him, to his surviving issue in such shares as he shall by last will and testament appoint, and, in default of such appointment, in equal shares.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt, and myself, and my son William H. Vanderbilt does not survive me but leaves issue surviving me, then I give, devise, and bequeath my residuary estate to such issue in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of a child, then I give, devise, and bequeath all my said residuary estate in equal shares to my brothers and sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

Thirteenth: I hereby give to the executors of this my will, as trustees of the trusts and of each of the trusts created by this my will, full power and authority, in their discretion, to sell, at public or private sale, at such times and places, and in such manner, and upon such terms and conditions as they shall deem expedient, or to lease or to rent or otherwise, dispose of, in such manner, for such periods, and upon such terms and conditions as they shall deem
expedient, any and all my real estate, wheresoever the same
22 may be situated, excepting only my said real estate known
as "Oakland Farm," as well as any and all personal property, constituting a part of any such trust, and to execute and deliver any and all deeds, leases, or other instruments necessary or proper for the accomplishment of such purposes.

Also, I give to my said executors and trustees full power and authority to invest and reinvest the principal or any part of the principal of any trust fund created by this my will, and any income accumulated during the minority of a beneficiary as aforesaid, in first mortgages on improved real estate situated within the city of New York; in bonds or stock of the city of New York; in bonds of the State of New York, or in bonds of the United States of America; in first mortgage bonds or stock of any railroad company that continuously for a period of seven years has paid dividends of not less than five per cent per annum on its stock, or in mortgage bonds of any railroad company, payment of the principal and interest of which is guaranteed by any other railroad company that has paid such dividends for such period.

Further, if and in the event that any corporation or company whose stocks or securities constitute or are held as a part of the principal of any trust hereby created shall be reorganized, or consolidated with any other corporation or company, or opportunity shall be offered to exchange any of its stocks or securities for other stocks or securities issued or to be issued by it, or for the stocks or securities of any other corporation or company, I give to my said
executors and trustees full power and authority, in their
23 discretion, upon such terms and conditions as they may deem
advisable, to exchange any such stocks or securities so held by them for the stocks or other securities of any such reorganized or consolidated corporation or company, or for other stocks or

securities of such corporation or company, or for stocks or other securities of any such corporation or company.

Also, I give to my said executors full power and authority, in their absolute discretion, to settle, compromise, or adjust any claim of any nature whatsoever that may be made or presented against my estate, upon such terms and conditions as they shall deem advisable and for the best interests of my estate, and I hereby expressly relieve them and each of them of any and all responsibility for any error of judgment or of fact that any beneficiary hereunder may consider them to have made in the making of such settlement, compromise, or adjustment.

If at the time of my death my father's estate shall not have been settled and distributed and I shall not have come into full possession of my final share thereof, I authorize my said executors to accept such share of my father's estate as shall be tendered to them by the executors of his will, and to make such settlement, compromise, or arrangement with respect to the amount or to the final receipt and delivery of the same as they may consider advisable; and I direct that no inventory, list, or accounting shall be required either in respect of my father's estate or of my estate, and I fully release my executors and trustees from any such inventory, list, appraisal, or accounting.

24 Fourteenth: I direct that any stock dividends that may be declared upon any of the stocks held as or constituting a part of any trust fund hereby created shall be treated as part of the income or profits thereof and shall be paid over to the person or persons entitled to such income or profits for the time being.

Fifteenth: I direct that my executors shall pay out of my residuary estate any and every inheritance, transfer, or legacy tax which shall be payable upon or under or on account of any gifts, devises, or bequests made by me in, or any rights of inheritance or transfer arising under, this my will by reason of such gifts, devices, or bequests, under the laws of the State of New York or of the United States or of any State therein or under the laws of any other country.

Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will.

I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.

Seventeenth: I hereby revoke any and all other and former wills and codicils by me at any time made.

25 In witness whereof I have hereunto set my hand and affixed my seal this 16th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ALFRED G. VANDERBILT. [L. S.]

The foregoing instrument, consisting of this and fourteen other typewritten pages, was subscribed and sealed by the testator, Alfred G. Vanderbilt, as, and was published and declared by him to be, his last will and testament, at New York City, New York, on the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen, in the presenc of us, and thereupon we, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

M. S. BARGER, *Newport, R. I.*
E. L. ROSSITER, *Greenwich, Conn.*
ROY C. GASSER, *Plandome, L. I.*

26 *Demurrer.*

United States District Court, Southern District of New York.

The defendant herein, by Roy C. Gasser, his attorney, demurs to the amended complaint of the plaintiff herein on the ground that it does not state facts sufficient to constitute a cause of action.

Wherefore, defendant demands judgment that the complaint herein be dismissed, with costs.

ROY C. GASSER,
Attorney for Defendant; Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

27 *Opinion, Learned Hand, D. J.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA against REGINALD C. VANDERBILT. } L. 22–306.

UNITED STATES OF AMERICA against FREDERICK L. MERRIAM. } L. 21–401.

UNITED STATES OF AMERICA against HENRY B. ANDERSON. } L. 21–402.

The cases arise upon the demurrers to complaints at law to recover the income taxes upon certain legacies left the defendants under the will of Alfred G. Vanderbilt, who died in 1915. The will disposed of a large estate, and set up various independent trusts of indefinite duration. The only parts relevant to these cases are the eleventh and sixteenth clauses, which read as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle,
28 Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand

dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

* * * * * * *

Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam, executors of this my will and trustees of the several trusts created by this my will.

I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants, so named as executors and trustees, qualified and have administered and are now administering the estate.

The question is whether the legacies so given are exempt as "bequests" or liable to the income tax as "compensation" for personal services.

29 Roy C. Gasser, for demurrants.

Edward F. Unger, C. T. Hendler, and Newton K. Fox, opposed.

LEARNED HAND, D. J.:

There seems to me no question whatever that these legacies in part anyway are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as executors and trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same. It is true that the form of the compensation is a "bequest," and a "bequest" is exempt; hence there is a verbal contradiction between one part of the statute and the other. Yet I cannot doubt that all bequests are not exempt. Suppose, for instance, that a man agreed to leave another a legacy if he would take care of him while he lived. The legacy would be a "bequest," but can anyone suppose that it would not be "compensation for personal services" which would be taxable?

The defendants argue that such legacies are payable though the executor do not complete his services. That is true. The English rule was that a legacy to an executor was presumably virtute officii and in recompense for his services and he must assent to his

30 appointment, Lewis v. Matthews, L. R. 8 Eq. 277. Yet very little was necessary, much less than formal qualification, Harrison v. Rowley, 4 Ves. 212. Indeed in Brydges v. Wotten, 1 Ves. & Beam. 134, trustees were allowed their legacies though they had done

nothing, probably because the legacies were payable before the trustees could qualify. If so, the rule does not truly apply to trustees. In America, where executors generally receive statutory commissions, such bequests have been spoken of as compensation which must be earned, Matter of Tilden, 44 Hun, 441; Renshaw v. Williams, 75 Md. 498. In some cases the language of the will apparently indicated as much, Harper's Appeal, 111 Pa. St. 243, or at least admitted of that interpretation, Richardson v. Richardson, 145 App. Div., 540. Morris v. Kent, 2 Ed. Ch. 175, much relied on by the defendants, decides nothing to the point, though the vice chancellor in his opinion quotes obiter the English rule that any indication of an assent to qualify is enough.

It seems to me to make no difference whether such bequests be regarded as payable merely on condition of qualification or only after the services are rendered. I assume the first to be the correct rule, and certainly in the cases at bar the legacies were all payable long before the services could be completed, because there were trusts of indefinite duration, which might extend thirty years or more. The legacies were given with the chance that the executors and trustees might not complete their services. I regard the point, however, as immaterial because the bequests are in either case equally
"compensation for personal services." Suppose a master pays
31 his servant in advance, trusting that he will live to complete.
Is the hire not a "compensation or personal services"? It is prospective compensation, indeed, but none the less it is not gratuitous; it is given to procure and to pay for the services. At least, how can it be said that it is not compensation, if the servant enters and completes his employment?

Therefore I attach no importance to the point of which so much is made, that the executor becomes entitled to his legacies on expressing his assent. More important is the opposite side of the same rule, that without such assent he does not become entitled. This rule is not because he gets the bequest eo nomine; it makes no difference that he is named in the will. Moreover, if the theory were that the bequest is given only to the office, he must qualify, which he need not. The condition that he must assent can only be because such bequests are treated as in recompense for his services, and so the books put it. He must at least undertake to perform while he can. If they were true legacies, he would get them whether he qualified or not.

But, the defendants say, such bequests as these are in any case not all compensation; in part anyway they are from the testator's bounty. As to the defendants, Merriam and Anderson, there is not the least reason to suppose that they were not solely in compensation for their services. The commissions on this estate do not appear in the record, but the will shows that the estate itself was very large indeed. No one could possibly tell, not even the testator, what the commissions would be. It may be that they would be less to each executor and trustee than $200,000, and it may be

32 that they would be more. Each defendant would get separate commissions as executor and second commissions also as trustee for so much as was in trust. He would also get commissions on the income of the trusts. Suppose, moreover, that the testator thought the legal commissions too little, and wanted to make sure that the defendants would qualify., so that his estate would certainly have their services. It is obviously impossible to say whether these bequests were in part bounty, even if the commissions should turn out much less.

As to the defendant, Vanderbilt, I confess it seems scarcely possible that the testator did not mean the legacy to do more than compensate him for his services. He was a brother, and it seems unlikely that he was given the larger legacy to insure his qualifying, or that the testator set that much more value to his services. Moreover, there is every reason to suppose that he would be the recipient of the testator's bounty. I have no question that had the testator been faced with the fact that his will in this form subjected the whole of his brother's legacy to taxes he would have changed it. But if he has in fact bequeathed the sum to him as compensation, how can I apportion it partly as such and partly as free bounty? Clearly not, if the language be unambiguous. I cannot substitute another expression, which I feel sure he would have used, had the consequences of his actual language been brought to his attention. I have already said that the language of the sixteenth clause seems to me to make the legacies compensation; and, if so, would it not contradict
33 that language to say that they were only in part compensation? The inequality in the bequests is not an inevitable sign that all might not have been so intended. The testator might think one executor's services to be worth more than another, and that what would secure one would not secure the other. I think the will means that all is to be compensation.

And if I were to say that the language was ambiguous what rule could a court or jury adopt to apportion the compensation? Granting that it would find that in part it was bounty, how could it say how much? It could not say that the bequests to the defendants Anderson and Merriam, were the test, because if Vanderbilt is to be allowed to try the issue, so must they. If it were possible to make a division of the legacies based upon any words in the will, and if, as I am for the moment assuming, the language used were ambiguous, then I can see how the issue might arise. But, granting that it is ambiguous, there is no language through whose interpretation the legacies may be divided. That must be imputed into the will without any intimation from the testator at all, and the result would not be a will, but the creature of the court.

I therefore conclude that the whole of the legacies must be treated as compensation and that the demurrers must be overruled. Judgments will go on the complaints as prayed.

L. H., *D. J.*

AUGUST 6, 1921.

34 *Opinion, L. Hand, D. J., filed September 12, 1921.*

UNITED STATES OF AMERICA vs. R. C. VANDERBILT.	22–306.
UNITED STATES OF AMERICA vs. H. B. ANDERSON.	L. 21–402.
UNITED STATES OF AMERICA vs. F. L. MERRIAM.	L. 21–401.

In this case, as I said on my original opinion, the question was not argued at bar whether, assuming that the legacies were in fact taxable, they must be taxable altogether; I did consider that question, and decided that they were taxable in whole. Subsequent reflection has led me to doubt whether this is necessarily the case, and I am therefore not prepared to give judgment absolute unless the defendants do not choose to answer over. It is in any case enough that the plaintiff is entitled to some relief; that being so the demurrers must be overruled. If, however, the defendants wish to insist that the legacies are taxable only in part, that part to be ascertained by reference to the amount given as compensation, assuming there is a way of dividing them, they must plead a partial defense.

35 I have, therefore, signed judgments respondeat over and the defendants may plead if they will. If they are content to rest their case upon the demurrers, they can allow judgment absolute to pass against them at the expiration of the time to plead over.

Anything I said in my original opinion regarding the impossibility of dividing the legacies for the purpose of taxat'on must be regarded as not decided until some further argument.

L. HAND.

SEPTEMBER 12, 1921.

36 *Order overruling demurrer.*

At a stated term of the United States District Court held in and for the Southern District of New York, at the United States Courts and Post Office Building, Borough of Manhattan, city, county, and State of New York, on the 12th day of September, 1921.

Present: Honorable Learned Hand, United States District Judge.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard by this court,

Now, after hearing Roy C. Gasser, Esq., of counsel for the defendant, in support of said demurrer, and Edward F. Unger, Esq.,

assistant United States attorney, of counsel for the plain-
37 tiff, in opposition thereto, and due deliberation having been had thereon, upon motion of William Hayward, United States attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered, that said demurrer be, and the same hereby is, in all respects overruled, and it is

Further ordered, that defendant have twenty days in which to plead to the complaint and that in the event of his failure to do so, that the plaintiff have judgment for the sum of $7,754.84 with interest thereon at the rate of six per cent per annum from the 30th day of June, 1916, with costs.

LEARNED HAND, *U. S. D. J.*

38 *Judgment.*

United States District Court, Southern District of New York.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard before the Honorable Learned Hand, United States district judge, at a stated term of this court held on the 20th day of July, 1921, Roy C. Gasser, Esq., of counsel for the defendant, having been heard in support of said demurrer, and Edward F. Unger, Esq., assistant United States attorney for the Southern District of New York, of counsel for the plaintiff, having been heard in opposition thereto, and due deliberation having been had thereon, and the court having handed down its opinion and supplemental opinion on the 6th day of August, 1921, and the 12th day of September, 1921, respectively, overruling the said demurrer, and an order having been duly made and entered herein on the 12th day of September,
39 1921, overruling said demurrer, to the amended complaint of the plaintiff herein and ordering that the defendant have 20 days in which to plead to the complaint and that in the event of his failure so to do, plaintiff have judgment for the sum of $7,754.84, with interest at 6% from the 30th day of June, 1916, with costs, and the time of the defendant to plead to said amended complaint having expired and no pleading having been interposed by the defendant, and the costs of the plaintiff having been taxed in the sum of

Now, on motion of William Hayward, United States attorney for the Southern District of New York, it is

Adjudged that the plaintiff have and recover of the defendant the sum of $7,754.84, together with the sum of $2,462.16, interest thereon, at the rate of 6% per annum, from the 30th day of June, 1916, together with the sum of $17.37, costs of the plaintiff as taxed, in all the sum of $10,234.37, ten thousand two hundred thirty-four and 37/100 dollars, and that plaintiff have execution against the defendant above named therefor.

Judgment signed this 15th day of October, 1921.

ALEX. GILCHRIST, Jr., *Clerk.*

40 *Petition for writ of error.*

United States District Court for the Southern District of New York.

And now comes the plaintiff in error, Henry B. Anderson, by Roy C. Gasser, his attorney, and says that on the 15th day of October, 1921, this court entered judgment herein in favor of the defendant in error and against the plaintiff in error for the sum of ten thousand two hundred thirty-four and 37/100 dollar ($10,234.37); and that in the judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff in error and whereby this plaintiff in error feels himself aggrieved, all of which will appear in more detail from the assignment of errors which is filed with this petition.

Wherefore the plaintiff in error prays this court for an order allowing him to prosecute a writ of error in his behalf to the
41 honorable United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of under and according to the laws of the United States of America in that behalf made and provided, and that a transcript of the record, proceedings, and papers of this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Second Circuit, and also that an order may be made fixing the amount of the security which the plaintiff in error shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will every pray, etc.

Dated, November 4th, 1921.

HENRY B. ANDERSON,
By ROY C. GASSER,
Attorney for Plaintiff in Error; Office & P. O. Adrress, 15 Broad Street, Borough of Manhattan, New York City.

42 *Order allowing writ of error.*

At a stated term of the United States District Court for the Southern District of New York, held at the New York Post Office Building in the said district in the Borough of Manhattan, city of New York, on the 4th day of November, 1921.

Present: Honorable Learned Hand, United States District Judge.

Upon the 4th day of November, 1921, comes Henry B. Anderson, by Roy C. Gasser, his attorney, and files herein and presents to this court his petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by him; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, and upon which this court

43 took and exercised jurisdiction, and upon which the judgment herein was rendered, duly authenticated, should be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and various proceedings may be had as may be just and proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff in error, Henry B. Anderson, giving bond according to law in the sum of $12,000.00 which shall operate as a supersedeas bond.

It is accordingly

Ordered, that a writ of error be, and the same is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore rendered herein on the 15th day of October, 1921, for the sum of $10,234.37 and the actions and rulings of the court upon which said judgment was rendered; and it is

Further ordered, that upon the making and filing with the clerk of this court of said bond all further proceedings be suspended and stayed until the final determination of such writ of error by the United States Circuit Court of Appeals for the Second Circuit and the coming down of the mandate of that court to this court.

L. HAND, *U. S. D. J.*

44 *Assignment of errors.*

United States District Court for the Southern District of New York.

Now comes the plaintiff in error, Henry B. Anderson, by Roy C. Gasser, his attorney, and in connection with his petition for a writ of error, says that in the record, proceedings of trial, and in the final judgment herein, manifest error has intervened to the prejudice of the plaintiff in error, and he assigns the following reasons, to wit:

(1) That the said United States District Court for the Southern District of New York erred in overruling the demurrer interposed by the plaintiff in error to the amended complaint filed in this action.

(2) The said court erred in holding that said amended complaint states facts sufficient to constitue a cause of action.

45 Wherefore said Henry B. Anderson, plaintiff in error herein, prays that the judgment entered in this cause in the office of the clerk of the United States District Court for the Southern District of New York, on or about the 15th day of October, 1921, in favor of the defendant in error and plaintiff below and against the plaintiff in error and defendant below, in the sum of ten thousand two hundred and thirty-four and 37/100 dollars ($10,234.37), because of error, be reversed, and the said District Court be directed to

enter a judgment sustaining said demurrer and dismissing said amended complaint and for such other and further relief as to the court may seem just and proper.

ROY C. GASSER,
Attorney for Plaintiff in Error, Henry B. Anderson; Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

46 *Undertaking.*

In compliance with the order allowing writ of error made the 4th day of November, 1921, the plaintiff in error gave a bond in the sum of $12,000, as therein provided, of the Fidelity and Deposit Company of Maryland, which said bond was approved by Mr. Justice John C. Knox, D. J., on the 10th day of November, 1921, and filed in the office of the clerk of the United States District Court for the Southern District of New York on the 12th day of November, 1921.

47 *Citation.*

United States District Court, for the Southern District of New York.

(Title omitted.)

By the Honorable Learned Hand, one of the United States district judges for the Southern District of New York, in the Second Circuit, to United States of America, defendant in error; greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the city of New York, in the district and circuit above named, on the 3rd day of December, 1921, pursuant to a writ of error filed in the clerk's office of the
48 District Court of the United States for the Southern District of New York, wherein Henry B. Anderson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States the one hundred and forty-sixth.

L. HAND,
United States District Judge for the Southern District of New York, in the Second Circuit.

49 *Stipulation as to transcript.*

United States District Court, Southern District of New York.

(Title omitted.)

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, January 20th, 1922.

ROY C. GASSER,
Attorney for Plaintiff in Error.
WM. HAYWARD,
United States Attorney,
Attorney for Defendant in Error.

50 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern district of New York, ss:

(Title omitted.)

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

51 *Opinion.*

United States Circuit Court of Appeals, for the Second Circuit.
No. 248-249. October Term, 1921.

Argued March 21, 1922. Decided April 3, 1922.

FREDERICK L. MERRIAM, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	In error to the District Court of the United States for the Southern District of New York. Before Hough, Manton, and Mayer, circuit judges.
HENRY B. ANDERSON, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	

Writ of error to the District Court for the Southern District of New York. Actions by the United States of America against
52 Frederick L. Merriam, defendant, and Henry B. Anderson, defendant, to recover an income tax under the income tax act of 1913 (38 Stat. 114, 116).

Roy C. Gasser, Esq., for plaintiffs in error.

Roy C. Gasser, Esq., William H. Hayes, Esq., of counsel.

William Hayward, Esq., U. S. attorney for the Southern District of New York, for defendant in error.

Thomas J. Crawford, Esq., asst. U. S. attorney, P. C. Alexander, Esq., special attorney, Bureau of Internal Revenue, of counsel.

MANTON, Circuit Judge.

We shall refer to the parties herein as plaintiff and defendants, as below.

Plaintiff sued to recover an income tax claimed to be owing by each of the defendants, arising out of moneys received by them from the estate of Alfred G. Vanderbilt. After the service of an amended complaint, a demurrer was interposed and motions were made for judgments which resulted in judgment for the plaintiff in each of these actions.

Alfred G. Vanderbilt died May 7, 1915, leaving a will which was duly admitted to probate on June 16, 1915. In that will he made a bequest to each of the defendants. This article of his will reads as follows:

"Eleventh: I give and bequeath to my brother Reginald C. Vanderbilt five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars
53 ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

"I give and bequeath to each of those persons who may be in my employ at my farm known as 'Oakland Farm,' at Portsmouth, Rhode Island, or on my properties known as 'Sagamore Lodge,' Camp 'Kill-Kare,' or 'Moose River Tract,' or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House, in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period."

Article sixteenth thereof provides as follows:

"The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustee."

These bequests were paid to the defendants in 1915 in the due administration of the estate. The amended complaint recites that each bequest was received "as given to him by said will." Each of the defendants made a return of his income for taxation prior to March 15, 1916, and neither included in said return this legacy so received. Their positions rest upon the act of Congress then in force providing that "income of a taxable nature shall not include the value of property * * * acquired by bequest."

The statute provides in §11B for exemptions and deductions and that "net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and whatever form * * * or the transaction of any lawful business carried on for gain or
54 profit or gains or profits or anything derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, device, or descent."

Both of the defendants qualified as executors, as did the others named, excepting Mr. Davies, who died five days before the death of the testator, and his legacy subsequently lapsed. The Commissioner of Internal Revenue made these legacies taxable as income, and the refusal to pay the assessment gave rise to these actions. The defendants contend that the bequests to them were legacies in the universally accepted and legal meaning of the term and as it is used in the income tax act. Further, that what was received is not taxable income because it was not given as consideration for services and was not derived from labor. (Merchants Trust Co. vs. Smietanka, 255 U. S. 509.) Income has been frequently described "as a gain derived from capital, from labor, or from both combined." (Stratton's Independence vs. Howbert, 231 U. S. 399.) And later, using the same definition, the Supreme Court has said that income can be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. (Eisner vs. Macomber, 252 U. S. 189.) The conditional or unconditional voluntary disposition of personal property by will is a bequest. (Jessup's Redfield, §917, p. 1138.) A bequest in lieu of dower which is a legacy given conditional upon the surrender by the legatee of a right of dower has been held to be a bequest. (Orton vs. Orton, 3 Keyes, 486.) In the cited case, the legacy was given in lieu of dower, and a provision was made that should there be a surplus in the estate after the payment of the legacies the legatee should share proportionately therein. The executors assumed the position that the widow was not entitled to any part of the surplus on the ground that a bequest in lieu of dower was not a legacy and that therefore she was not a legatee, but the court held that, notwithstanding the bequest to the wife was declared to be in lieu of dower, it was still a legacy. "Such it was in legal as well as common parlance and it was constantly
55 called by that name in the books." Direction by the testator

that his debts should be paid negatives the presumption that a bequest to a creditor is conditional upon a waiver of his claim and makes his legacy absolute. (Boughton vs. Flint, 74 N. Y. 476.) Bequests to executors or trustees in lieu of compensation for their services or "for their care and pain" have been held to be bequests in every acceptation of that term. And a legacy to an executor, even expressed to be "for care and pains," is not to be regarded in the light of a debt or as founded in contract or to be governed by principles applicable to contracts, for to do so would make the executor who undertook the discharge of his duties entitled to his legacy in preference to all other legacies even if there were a deficiency of assets to satisfy all of them, and a legatee of this description must abate equally with other legatees. (Morris vs. Kent, 2 Edwards Chancery, 179.) A will providing a bequest of $700 over and above any and all commissions to an executor entitled him to receive it (upon condition that the executor should accept and qualify) not as compensation for services, and it was held not to abate with the general legacies. It was said to be a general legacy and subject to abatement. (Waters vs. Collins, 3 Dem. 374.) Lord Hardwicke in Heron vs. Heron (2 Atk. [English Reports, vol. 26, p. 507] 171) says that bequests to executors "even though given expressly for care and pains, do not differ from general legacies so as to take them out of the ordinary rule in respect to abatement for deficiency of assets." Clayton vs. Akin (38 Ga. 320) held that one thousand dollars given and bequeathed "for extra trouble he may have had in executing this my will" was a legacy to the executor in every aspect of it, a general legacy, and as to abatement in case of a deficiency of assets must take its fate as such.

Bequests are either absolute or conditional, vested or contingent. It was not essential for the legatees named to qualify in order to become entitled to their legacies. A bequest to one in lieu of compensation for his services which is conditional only upon his
56 willingness to qualify and serve if circumstances permit him to do so, is nevertheless a legacy. We must assume that Congress had in mind, by using the term "bequest" in the income tax law, to give to it that settled rule of construction well known and sanctioned by judicial decision. (Kepner vs. U. S., 195 U. S. 100.) "That presumption is resistless except against an intention imperatively clear." Lynch vs. Turrish, 247 U. S. 221.) In interpreting statutes levying taxes it is the rule "not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out." (Gould vs. Gould, 245 U. S. 151.) The case differs from one where there is a provision in a will to pay a contractual obligation, a debt, which would be collectible even if the obligor did not provide for its payment by will, for there the money agreed to be paid would be acquired by contract and not by bequest. (In re Baker, 178 N. Y. 575; Matter of Vanderbilt, 184 App. Div. 661; In re Alfred G. Vanderbilt, 226 N. Y. 638.) Everything that comes is is not income tax-

able under the statute. (So. Pac. Co. vs. Lowe &c., 247 U. S. 330.) It is clear that Congress intended the words "acquired by gift, bequest, devise, or descent" to be words of exception and not of exemption. The word "bequest" is used in the exemption clause of the act, and the act provides that income shall include all gains derived from compensation for personal services except property acquired by bequest. It is clear that it was the intent of the testator to give the legacy and not to permit the executors to work for it.

It is contended by the Government that article sixteenth of the will is in effect a testamentary fixing by the testator of the compensation to be paid for services to be rendered by his executors, but bequests are not compensatory, they are donative. The taxing statute intended something different. The compensation for personal services of whatever kind and in whatever form immediately follows and supplements the term "salaries" in the statute, which in-
57 dicates a periodical payment made as compensation for regular employment (Benedict vs. U. S., 176 U. S. 357) and wages which are generally applied for manual labor. (Matter of Stryker, 158 N. Y. 526.) We think Congress contemplated and intended to cover payments under contracts of employment expressed or implied and intended the taxing statute to reach all forms of payment for services rendered. But this does not affect the intention of Congress that the essential factor be present that whatever is sought to be taxed under the phrase must be a consideration for work performed or to be performed, and that it must be compensation derived from or flowing from labor. The income within the purview of the Constitution is defined to be a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. (Eisner vs. McDonald; Straton's Independence, supra; Doyle vs. Mitchel Bros. Co., 247 U. S. 179.) A legacy acquired by bequest does not proceed from labor. The question must be determined, not by the phrase "in lieu of commissions," but upon the question of whether the bequest was in fact a consideration for services to be rendered. The bequests were not stipulated as a condition for service. As a general principle, if an executor unequivocally manifests an intention to act in the executorship, that will be a performance of the condition upon which his legacy depends, although he be prevented by circumstances from actually serving. (Williams on Executors, Sixth Am. Ed. Vol. II, 1394; Morris vs. Kent, supra; Scofield vs. St. John, 65 How. Pr. 292.) In the case of Brydges vs. Wotten (1 Ves. & Beam, 134) a legatee named as trustee and to whom the legacy was given as a token of regard and recompense for his trouble died nineteen months after the death of the testator, without having acted at all, and he was held to have become entitled to his legacy in the absence of any refusal or neglect to act. The rule of law is well settled that, where bequests are made conditional only upon being ready and willing to assume the excutory office provided circumstances permit them
58 to do so, to entitle them to legacies it is not required of them

that they should render services for which they would have a legal claim for compensation in the form of commissions. Inability of a legatee to enter upon performance of service as executor would not prevent the absolute vesting of a bequest in him in lieu of commission. (Bean vs. Carlton, 12 N. Y. Supp. 519, affd. 126 N. Y. 642; Wheeler v. Board, 12 Johns. 363.)

Assuming that the executors named had all died in a common disaster before the formalities of the probate of the will had been completed, could not their representatives respectively insist upon payment of the respective legacies? There is little doubt that the legacies would then have been acquired by bequest within the meaning of the law. We think the whole of each legacy was payable independent of services. It was an acquisition to each legatee by bequest within the meaning of the taxing act and was therefore not taxable as income.

Judgments reversed.

59–60 *Judgment.*

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the City of New York, on the 10th day of April, one thousand nine hundred and twenty-two.

Present: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, circuit judges.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

C. M. H.
M. T. M.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

61 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 60, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Henry B. Anderson, plaintiff in error, against United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 19th day of June in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] WM. PARKIN, *Clerk.*

62 *Writ of certiorari.*

(Filed Nov. 16, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Henry B. Anderson is plaintiff in error and the United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
63 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

64 In the Supreme Court of the United States, October Term, 1922.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

JAMES M. BECK,
Solicitor General.
ROY C. GASSER,
Counsel for Respondent.

OCTOBER 30, 1922.

65–69 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 9th, 1922.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, PETITIONER,
v.
HENRY B. ANDERSON, RESPONDENT. } No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit reversing a judgment heretofore rendered by the District Court of the United States for the Southern District of New York in favor of the United States and against Henry B. Anderson.

STATEMENT OF CASE.

This is an action by the United States of America, hereinafter referred to as the plaintiff, against Henry B. Anderson, hereinafter referred to as the defendant, for the recovery of $7,754.87, with penalty and interest, on account of additional income tax for the year 1915 under the provisions of the act of October 3, 1913. The defendant is one of

the executors of and trustees under the last will and testament of Alfred G. Vanderbilt, deceased. The sole question involved in whether a bequest in the sum of $200,000, expressly stated by the testator to have been made "in lieu of all compensation or commissions" to which defendant would otherwise be entitled as executor or trustee and received by the defendant during the year 1915, constituted taxable income within the meaning of the act of October 3, 1913.

The district court overruled the demurrer to the amended complaint and held that the bequest in question was compensation fixed by the testator in lieu of the statutory compensation. The Circuit Court of Appeals for the Second Circuit upon writ of error to the District Court reversed the judgment of the District Court.

SECTION OF THE STATUTE INVOLVED.

Section II of the act of October 3, 1913 (38 Stat. 114–166), provides:

> A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * a tax of 1 per centum per annum * * *.
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid,

* * * or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.

REASONS FOR GRANTING PETITION.

1. The court erred in holding that the bequest to the defendant was not compensation for the services to be rendered by him as executor and trustee.

2. The court erred in holding that the bequest to the defendant was not taxable income within the meaning of the act.

3. The question is of importance not only by reason of the fact that it is determinative of a number of income tax cases pending in the courts but also by reason of the fact that the ruling affects all of the revenue acts where the substance of the provision in question has been retained.

BRIEF IN SUPPORT OF PETITION.

It is well settled by many decisions in this country that a bequest to an executor "in lieu of commissions" constitutes a testamentary fixing of the compensation to be paid the executor for the work, labor, and services to be performed by him.

Fletcher v. *Hurd*, 14 N. Y. Supplement, 388.
Matter of accounting of Mason, 98 N. Y. 527.
Matter of Tilden, 44 Hun. 441.
Matter of Vanderbilt, 68 App. Div. 27.
Renshaw v. *Williams*, 75 Md. 498.
In re Sweatman's Estate, 223 Pa., 552.
Sinnott v. *Kenaday*, 14 A. C. (D. C.) 1, 24.
(Reversed on other grounds, 179 U. S., 696.)

In *Fletcher* v. *Hurd* (14 N. Y. Supplement, 388) the court held that a bequest of the residue to executors "to be divided equally between them *in lieu of compensation* for their services in the execution of their trust" was intended as compensation and that a person designated as executor who failed to qualify was not entitled to share in the bequest. To hold otherwise, the court said, would "convert a bequest in compensation for services into an absolute individual gift."

In the *Matter of Accounting of Mason* (98 N. Y. 527), the Court of Appeals of the State of New York said respecting a bequest of the residue given to the executors without qualifying words:

> This bequest was not intended for the specific compensation mentioned in section 2737 of the code. There is no language in the will indicating that it was meant to be *in lieu of commissions*.

The very language upon the absence of which the decision in that case turned is present here.

In *Renshaw* v. *Williams* (75 Md. 498) the court said:

> There is no doubt that the legacy was given to Mr. Williams not as a gratuity and not unconditionally, but in lieu of commissions as executor. Upon this subject the will is explicit. * * * That legacy was given as a payment for all the labor and services which Mr. Williams might perform in completely settling Mrs. Conine's whole personal estate.

> * * * where he has been bequeathed *in lieu of commissions* a larger legacy than the commissions would amount to, and does, as administrator *pendente lite*, only that which he was bound to do as executor, the legacy must be treated as a full compensation for all the labor it was intended to cover—namely, the entire administration of the whole estate.

In the case of *Sweatman's Estate* (223 Pa. 552) the testator provided in his will that each of the three executors should receive $6,000 "in lieu of all commissions." The court, in holding the personal representative of one of the executors who died before fully performing the services as such executor to be entitled to the bequest, said:

> His death did not deprive his estate of his right to *what had been earned* and it was *in lieu of* that compensation that he was given his legacy. It must be presumed that the testator had in mind the possibility that death might reduce the number of his executors and that he considered such a contingency when he fixed *the compensation to be paid* to each of them.

The cases cited by the Circuit Court of Appeals in support of the conclusions reached by it are based upon the English rule which holds a fiduciary office to be an honorary one and requires the incumbent to serve gratuitously. The rule obtained in this country until changed by statute. (See *Manning* v. *Manning*, 1 Johnson's, ch. 527.) In practically every

State of the United States, however, including New York, compensation is now provided by statute for executors, trustees, and other fiduciaries. The reason for the rule thus fails, and with it the rule itself.

In providing that the value of property acquired by bequest should not be included in net income, Congress did not intend to exempt from taxation compensation for personal services paid in the form of a bequest. This appears from the express language of the act, including in its definition of income "compensation for personal service of whatever kind and *in whatever form paid.*" There is to be found in the clause in question no legislative intent to exclude from taxation bequests given as compensation for services rendered or to be rendered.

Furthermore, it is settled that in its general acceptation "bequest" denotes a bounty or gratuity and not payment. In *Reynolds* v. *Robinson* (82 N. Y. 103) the Court of Appeals said:

> A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument and would violate the policy of the statute of wills.

In *Disston et al.* v. *McClain* (147 Fed. 114) the court defined a legacy as follows:

> Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the

> personal estate of an intestate, so a legacy is a definite *gift* by will of personal property, either general and pecuniary or specific.

That the word "bequest" was used in that sense in the act is also apparent from a reference to the words "gift" and "descent" with which it is associated in the clause in question. Contrasting the word "bequest" with the provision which defines income as including "compensation for personal service * * * *in whatever form paid*" resolves the doubt, if any exists.

Congress in providing that a "bequest" should not be included as income used the term in the sense in which it is generally understood and did no more in enacting the clause in question than point out that receipts not derived from capital or labor or both combined do not constitute income. As, under the authorities, the bequest received by the defendant is compensation fixed by the testator for the services to be rendered by the defendant as executor and trustee, it clearly constitutes taxable income, the form of payment by express mandate of Congress being immaterial.

It is, therefore, respectfully submitted that a writ of certiorari should issue and the judgment of the Circuit Court of Appeals for the Second Circuit be reviewed, to the end that it may be reversed and the judgment of the District Court reinstated.

JAMES M. BECK,
Solicitor General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, petitioner,
v.
FREDERICK L. MERRIAM. } No. 67.

THE UNITED STATES OF AMERICA, petitioner,
v.
HENRY B. ANDERSON. } No. 68.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are actions of law by the United States of America, plaintiff, against Frederick L. Merriam and Henry B. Anderson, defendants, respectively, for the recovery of certain additional income taxes for the year 1915 under the provisions of the Act of October 3, 1913.

The amended complaints allege the following facts:

On May 7, 1915, Alfred G. Vanderbilt died leaving a last will and testament which was duly admitted to probate by the Surrogat's Court of the County of New York on June 16, 1915. In the eleventh paragraph of his will, the testator provided in part as follows (R. 8):

> ELEVENTH.—I give and bequeath to my brother Reginald C. Vanderbilt, Five hundred thousand dollars ($500,000); to my uncle Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000); and to Howard Lockwood, One thousand dollars ($1,000).

The testator further provided in the sixteenth paragraph of his will (R. 12):

> SIXTEENTH.—I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam Executors of this my Will and Trustees of the several trusts created by this my Will.
>
> I direct that no bond shall be required in any State or country to qualify my said Executors to act as such or as trustees hereunder.
>
> The bequests herein made to my said Executors are in lieu of all compensation or com-

missions to which they would otherwise be entitled as Executors or Trustees.

Each defendant duly qualified as executor of and trustee under the said last will and testament, and letters testamentary were duly issued to each of them by the said Surrogate's Court on June 16, 1915. During the calendar year 1915 each defendant received the whole sum thus given him in "lieu of all compensation" as Executors and Trustees. Neither defendant, within four months from June 16, 1915, pursuant to the provisions of Section 2753 of the Code of Civil Procedure, renounced said bequest to him, and no commissions were ever allowed or paid to the defendants thereunder.

Pursuant to the requirements of Section II of the Act of October 3, 1913, each defendant filed with the Collector of Internal Revenue a return, purporting to be a true and complete statement of the gains, profits, and income received by or accrued to the defendants, respectively, during the calendar year 1915. Neither defendant included in his return the amount or any part thereof received by him under the will. By reason of such failure to include this sum in his return and to pay a tax thereon, the United States claimed that each defendant was liable for additional income tax for the year 1915 in the following amounts: Frederick L. Merriam, $10,912.26, with interest thereon from June 30, 1916; Henry B. Anderson, $7,754.87, with interest thereon from June 30, 1916.

Demurrers were interposed to each amended complaint upon the ground that neither stated facts

sufficient to constitute a cause of action. The District Court overruled the demurrers and gave the defendants leave to answer over (R. 13–17). The privilege was not availed of and judgment absolute was accordingly entered against each defendant. The significance of this will be discussed in the concluding portion of this argument (*Post*, pp. 35–38). From these judgments writs of error from the Circuit Court of Appeals for the Second Circuit were sued out (R. 20). That court reversed the judgments below, holding that the sums of money in question were payable independently of services and not as compensation (R. 23–28). This Court then allowed writs of certiorari to review those decisions.

The sole question involved is whether the sums of money which were given to the respondents in lieu of the compensation allowed by law constituted taxable income within the meaning of the Act of October 3, 1913.

The petitioner contends that the so-called bequests were compensation to the respondents for personal services rendered by them to the estate of Alfred G. Vanderbilt as executors and trustees, and as such were taxable under the express provisions of the Act.

Respondents contend that the sums so received by them were not taxable income (1) because they were bequests and expressly exempted by the Act, (2) because they were not income within the meaning of the Act and of the Sixteenth Amendment to the Constitution.

THE STATUTE.

The statute involved is Section II of the Act of October 3, 1913 (38 Stat. 114, 166). The pertinent parts thereof are as follows:

> A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * a tax of 1 per centum per annum upon such income * * *.
>
> Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax [at graduated rates].
>
> * * * * *
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent * * *.

POINT I.

"Bequest" as well in the terminology of the law as in its general acceptation implies a bounty or gratuity. It is in such sense that "bequest" is used in the Act of October 3, 1913.

The bequests to the respondents of $250,000 and $200,000, respectively, were expressly stated by the testator in his will (R. 12) to be—

> in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.

Despite this fact, it is contended that they nevertheless fall within the provisions of the subparagraph B of Section II of the Act of October 3, 1913, which excludes from taxation "the value of property acquired by gift, bequest, devise, or descent." This contention, we submit, is clearly untenable, both in the light of the authorities and the text of the Act itself.

The word "bequest," both in its usual and in its legal signification, means a gratuity. It presupposes a bounty flowing from the testator to the beneficiary. It is practically synonymous with gift, the only distinction being that a gift results from an act *inter vivos*, and a bequest takes effect at death. Such is the meaning given the term by the dictionaries, by the text writers, and by the courts.

In Webster's Dictionary "gift" is defined as "anything given; anything voluntarily transferred by one person to another without compensation; a

voluntary transfer of real or personal property without any consideration."

The same authority states that the word "bequeath" is "properly applied to a *gift* by will or legacy, i. e., of personal property," and "bequest" as "that which is left by will, especially personal property; a legacy; also a *gift*."

In Bouvier's Law Dictionary "bequest" is defined as "a *gift* by will of personal property." A similar definition is given in Black's Law Dictionary.

In Anderson's Dictionary of Law the following definitions appear: "Bequest: a *gift* of personalty by will; the clause in the instrument making the gift; the thing itself so given."

Similarly Blackstone in his "Commentaries" (Chase's edition, p. 609) defines "legacy" as "a bequest, or *gift*, of goods and chattels by testament."

Schouler in his work on Wills, Executors, and Administrators, in defining "devise" and "bequest" states (5th edition, vol. 1, p. 3) that a "'devise,' properly speaking, is a *gift* of real property by one's last will and testament * * *; 'bequest,' on the other hand, is a *gift* by will of personal property."

See also Heaton on Surrogates' Courts (3rd ed., vol. 2, p. 1283), where the learned author states that:

> A general legacy is a *gift* of personal property by a last will and testament not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind.

See also 40 Cyc., 994.

A direction by a testator that his executors should pay an obligation is not a bequest. When a testator directs his executors to pay a creditor, the latter does not receive a bequest. He simply gets his own, and his right to it is independent of the testator's direction. The debts of an estate for administration expenses are none the less debts and do not differ in principle from *ante mortem* debts.

Furthermore, the courts universally refer to bequests as gifts.

> In re *Hoover's Estate*, 7 N. Y. Supp. 283.
> In re *Daly's Estate*, 89 N. Y. Supp. 538.
> *Disston et al.* v. *McClain*, 147 Fed. 114.

In the case of *In re Daly's Estate*, *supra*, the question involved was whether a person who occupied toward the testatrix the relationship of child to parent was entitled to compensation for services out of the estate of the decedent in addition to a devise contained in the will. The Court held the devise to be a gift and the claimant to be entitled to compensation for her services upon proving an understanding or expectation on the part of the decedent to pay therefor, saying at page 541:

> The law seems well settled that a bequest or devise to a creditor is not to be regarded as payment of an indebtedness, unless the will expressly declares, or the surrounding circumstances clearly indicate such an intent on the part of the testatrix. A devise is a *gift* of real property by a last will and testament. * * *

> *A legacy implies a bounty and not a payment.* (Italics ours.)

In the case of *Disston* v. *McClain, supra,* which involved the question of a legacy tax under the Act of 1898, the Court defined a legacy as follows (page 117):

> Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the personal estate of an intestate, so a legacy is a definite *gift by will* of personal property, either general and pecuniary, or specific. (Italics ours.)

Respondents cite the case of *Orton* v. *Orton,* 3 Keyes, 486, in support of their contention that the term "bequest" includes not only gratuities but "things given as a recompense." What the Court decided in that case was that the testator's widow, having accepted a bequest given to her in lieu of dower, was a legatee and, as such, was entitled to share under the terms of the will in a pro rata distribution of the residuary estate along with the other legatees. Having once elected to accept the bequest in lieu of dower, the widow obviously took as a legatee under the will. With that we have no quarrel. The Court's observation as to the legal intendment of the word "legacy" was clearly *dictum.* Exactly contrary is the *decision* in the case of *Reynolds* v. *Robinson,* 82 N. Y. 103. The plaintiff in that action sought to recover for services rendered by his wife to defendant's testator.

Plaintiff's wife was an adopted daughter of defendant's testator and had performed services as a housekeeper for her father after her marriage to the plaintiff. The defense interposed was that under an agreement these services were to be compensated for by gifts to the plaintiff and his wife from the testator in his lifetime and by legacies in his will. The testator in his will, after providing for the payment of his debts, left legacies to plaintiff's wife and daughter in an amount less than the alleged debt. The will contained no provision that the legacies were intended as compensation for the services rendered. The defendant sought to show upon the trial by the testimony of the scrivener who drew the will that at the time it was drawn the testator stated that he had promised to pay plaintiff's wife for her services by will and that he directed the insertion of the legacies to plaintiff's wife and her daughter in order to comply with such promise. In sustaining the exclusion of the testimony, the Court of Appeals said (pp. 106, 107):

> "The only material question of law presented by the record arises upon the exception to the exclusion by the referee of the offer of the appellants to show by the scrivener who drew the will that at the time it was drawn the testator stated that he had promised Mrs. Reynolds to pay her for her services by will, and directed the insertion of the legacies to Mrs. Reynolds and her daughter, giving as a reason for the instruction that it was to comply with such promise. The offer in sub-

stance was to show by the declarations of the testator, made when the will was drawn, that the legacies were intended as a payment for the services in question.

The general rule is that declarations of a testator, before, contemporaneously with, or after the making of a will, are inadmissible to affect its construction (1 Redf. on Wills, 538). In *Mann* v. *Executors of Mann* (1 Johns. Ch. 231), Chancellor Kent said that the rule was well settled that parol evidence can not be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two cases, viz, when there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described, or to rebut a resulting trust. *A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument, and would violate the policy of the statute of wills,* "for then," as Lord Chancellor Talbot said, in *Fowler* v. *Fowler* (3 P. Wms. 353), "the witnesses, and not the testator, would make the will." (Italics ours.)

The foregoing authorities clearly establish that the word "bequest" in its general as well as in its legal acceptation implies a bounty and not a payment and show beyond peradventure that the term is donative and not compensative in its signification.

It is in such sense that the word is used in the statute as a moment's reflection will show. The word "bequest" is used in the Act immediately after the word "gift" and before the word "descent," and so by the familiar rule of *noscitur a sociis*, it is to be defined as a *gift* by will, quite apart from the fact that such is its ordinary meaning as shown above. It is manifest that Congress used the words "bequest, devise, or descent" to mean property given by will or descending by statutes of distribution or descent as distinguished from property passing for a consideration.

Furthermore, it is provided in the same subparagraph of the Act that "compensation for personal services in whatever form paid" is taxable income within the meaning of the Act. Contrasting the word "bequest" with the words "compensation * * * in whatever form paid" should resolve the doubt if any exists. If what is received is "compensation" even though paid in the form of a bequest by will it is nevertheless taxable income, *a fortiori* when testator expressly characterizes the bequest as compensation. If, however, it is a donative bequest as distinguished from "compensation" it is not taxable income.

The statute manifestly does not exempt from taxation income paid in the form of a bequest. The *entire* net income of the taxpayer is expressly made taxable under Paragraph A of the Act. The words "but not the value of property received by gift, bequest, devise, or descent" constitute, as it were,

legislative signposts for the guidance of the taxpayer for the purpose of pointing out what is not income.

This legislative definition has since been confirmed by the Supreme Court in the cases of *Eisner* v. *Macomber*, 252 U. S. 189, 207, and *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, 518, where it is said "Income may be defined as the gain derived from capital, from labor, or from both combined, *provided it be understood to include profit gained through a sale or conversion of capital assets.*"

Under this definition a bequest in the nature of a gift is not income, whereas compensation for personal services, though in the form of a bequest, is a gain derived from labor and hence income and clearly taxable under the Act. The bequests in the cases at bar, as we shall point out below, constitute compensation to the respondents for their services as executors and trustees under the will of Mr. Vanderbilt. Such compensation is by definition income and taxable under the express words of the statute.

POINT II.

The bequests to the plaintiffs in error "in lieu of all compensation and commissions to which they would otherwise be entitled as executors or trustees" constitute "compensation for personal services" within the meaning of the Act of October 3, 1913, and as such are taxable as income under the Act.

Under the common law, a fiduciary office is honorary and gratuitous. Thus it has long been established in England that executors and trustees are

not entitled to compensation for their services. The rule likewise obtained in New York until changed by statute. This is shown in the case of *Manning* v. *Manning*, 1 Johnson's Ch. 527, decided in 1815, where Chancellor Kent said (p. 532):

> I think it is not to be denied that the law is settled against the claim of a trustee to compensation. * * * the rule applies not to executors merely, but equally to trustees of every description. * * * A trust is regarded, in chancery, as a matter of honor and conscience, and undertaken with humane, or friendly, or charitable, and not with mercenary, views.

Again the Chancellor said (pages 533, 534):

> It appears to be the practice in several of the United States to allow a commission of so much *per centum* to executors and other trustees. * * * But this practice can not be received here as authority, however respectable the source; for it is not founded upon a different construction of the English law, but upon local usages or statutes, which have confessedly changed the English rule.

The legislation referred to in the Chancellor's opinion gradually spread throughout the country and it has long been the policy in most, if not all, of the States of the United States fairly and reasonably to compensate fiduciaries for the services rendered by them. Most of the States have fixed by statute the rates of compensation to be paid, generally upon a per centum basis.

Thus in New York, at the time of decedent's death, compensation to executors and trustees was provided for by Section 2753 of the Code of Civil Procedure.[1] Moreover, in jurisdictions where statutory compensation is provided for, the right of a testator is recognized to fix the compensation of his executor or trustee in an amount equal to, greater, or less than, that fixed by law. (*Ireland* v. *Corse*, 67 N. Y. 343; *Secor* v. *Sentis*, 5 Redfield Surr. 570; *Connolly* v. *Leonard*, 114 Me. 29; *Lennig's Estate*, 53 Pa. Sup. Ct. 596; 24 Corpus Juris, 989.)

At the time letters testamentary were issued to plaintiffs in error it was provided by Section 2753 of the Code of Civil Procedure:

> * * * Where the will provides a specific compensation to an executor, administrator, * * * or trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters * * * he renounces the specific compensation.

It is conceded (R. 2) that the respondents did not renounce the so-called bequests within the time limited and that no commissions have been allowed or paid to them under the Statute referred to. Thus respondents have construed the bequests as testamentary compensation for their services as executors and trustees. It is quite true that if

[1] It gives each executor or trustee 5% on the first $1,000, 2½% on the next $10,000, and 1% on the balance over $11,000.

the bequests were not compensation, there would have been no necessity for the filing of renunciations. In that event, however, they would have received large sums of money by way of statutory commissions, *but concededly no commissions were paid them.* The reason, of course, is obvious. They were not entitled to commissions—not because by this direction of the testator they were to receive no compensation (*Matter of Vanderbilt*, 68 N. Y. A. D. 27), but because the bequests were given to the executors *as compensation*, and were so recognized by them.

The facts, we submit, admit of no other conclusion.

Aside from the foregoing considerations, there can be no question that under the authorities in this country the amounts received by the respondents under the terms of Mr. Vanderbilt's will constitute compensation for the personal services to be rendered by them to the estate in their capacities of executors and trustees. As the Court below aptly said in its opinion (R. 14):

> There seems to me no question whatever that these legacies in part anyway are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as Executors and Trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same.

It will be contended, however, that the conclusion, reached by the District Court, that the bequests constitute testamentary compensation, because given in lieu of statutory compensation, does not *necessarily* follow from the premises. In the case of *Orton* v. *Orton*, *supra*, upon which reliance is placed, the Court, as before stated, merely held that a widow taking a bequest in lieu of dower was a legatee and as such entitled to share in the residuary estate under the terms of the testator's will along with the other legatees. Argument is made therefrom that since a bequest in lieu of dower is not dower, therefore a bequest in lieu of statutory compensation is not compensation. The argument, however, is patently fallacious. The words "in lieu of all compensation or commissions," etc., merely mean that the sums specified are given in lieu of the *statutory* compensation or commissions. They effect a substitution of the *amount* of compensation fixed by the will for the *amount* of compensation allowed by Statute.

In the case of *Matter of Tilden*, 44 Hun, 441, the question before the Court was whether the executors who in a previous accounting had been allowed full compensation provided for in the will should in a subsequent accounting be allowed additional compensation for services rendered. The testamentary provisions in question read (p. 443):

> In lieu and exclusion of all other commissions and compensation to my executors for performing their duties under this will, and in addition to their actual and necessary dis-

> bursements and expenses, I authorize them to receive from my estate the following commissions, * * * such commissions to be in full for such services, and the amount to be divided among my executors, from time to time, equitably, in proportion to their respective services.

The Court held that this language provided for compensation and not for a gratuity, and, in modifying the order of the Surrogate, said (at p. 444):

> The learned surrogate has based his decision in reference to this matter upon the ground that this compensation provided for in the will in excess of that allowed by law, is looked upon as a legacy, and a legacy is not discharged until paid. But it does not seem to us that this is a correct view. The provisions in the will were intended to be as compensation for services rendered, *to be in no respect a gift*, but an authority to charge for their services a certain sum. (Italics ours.)

This case was approved and followed in the case of *Richardson* v. *Richardson*, 129 N. Y. Supp. 941, in which the Court said (pp. 943, 944):

> As was said in *Matter of Tilden*, 44 Hun, 441, 444, in which the Surrogate's Court had held that a similar compensation provided in a will, in excess of that allowed by law, was not a legacy: "The provisions in the will were intended to be as *compensation for services rendered, to be in no respect a gift*, but an authority to charge for their services a certain sum."

> *The compensation provided by the will is not a legacy, and does not abate with the legacies,* but is compensation, carefully determined by the testator and directed to be paid for the services to be rendered, and is therefore to be paid in full. (Italics ours.)

In *Matter of Accounting of Mason*, 98 N. Y. 527, the testatrix bequeathed her residuary estate to her executors. The claim was made that the bequest was given as compensation for the services the executors should render in their representative capacity. As the will contained no provision to that effect, the Court properly overruled the contention, saying (p. 533):

> The nineteenth clause of the will is as follows: "All the rest, residue, and remainder of my estate, real and personal, not hereinbefore disposed of, I give, devise, and bequeath unto my friends Alonzo Wynkoop, Bradley Wynkoop and Francis O. Mason, who are hereinafter mentioned as the executors of this my will, in equal shares." The claim is made on behalf of the appellants that this bequest was made to the executors as a compensation for the services which they should render in administering upon the estate. This bequest was not intended for the specific compensation mentioned in Section 2737 of the Code. There is no language in the will indicating that it was meant to be *in lieu of commissions.* If these executors had renounced before letters were issued, they would have been entitled to receive this bequest; and if one of them, at

> any time after qualification, had resigned and been discharged, it would not have interfered with his right to take his share in the bequest. The right of the residuary legatees to take under the residuary clause did not depend upon their acting and rendering services as executors; but the bequest to them was a bounty which they were entitled to receive as if they had no other connection with the will than that of legatees thereunder. Before a legacy can be held to be made in discharge of a debt, *or in compensation for services to be rendered by executors*, there must be language in the will from which such an intention can be inferred. Here there was none. (Italics ours.)

In the recent case of *Matter of O'Donohue Estate*, 115 N. Y. Misc. 697, the testatrix in her will provided:

> I give and bequeath to my executors and executrices hereinafter named $1,200.

In the latter part of the will the testatrix appointed her three children executors and directed that "they serve without fees." An appeal was taken by the executors from the order entered upon the report of the transfer tax appraiser on the ground that he had not permitted them to deduct the statutory commissions, which greatly exceeded the total amount of the bequests to the executors. The Surrogate in modifying the order and allowing a deduction of $1,200 to each person named as executor, said (p. 698):

> Reading these paragraphs together, the will must be construed *as fixing $1,200 as the*

compensation of each executor in lieu of fees. The latter clause quoted above would then read as if the testatrix had said "they shall serve without fees, *excepting the compensation hereinbefore fixed.*" As my colleague, Surrogate Cohalan, pointed out in *Matter of Neustadter*, N. Y. L. J., August 16, 1913, the executors named could have renounced their appointment and an administrator c. t. a. would have been appointed. They qualified, however, and not having renounced the specific compensation within four months from the date of their letters (sec. 2753, C. C. P.), they must be held to have accepted the limited allowance fixed by testatrix *in lieu of their statutory commissions.* (Italics ours.)

The rule that bequests to executors in lieu of commissions are compensative and not donative is recognized throughout the country.

In the case of *Renshaw* v. *Williams*, 75 Md. 498, the testatrix's will provided (p. 503) "I give and bequeath to E. Calvin Williams, of the said City of Baltimore, the sum of $5,000 absolutely." A subsequent clause of the will provided, "I hereby nominate, constitute, and appoint my son-in-law, Genl. Frank H. Starring, and E. Calvin Williams, of the City of Baltimore, and State of Maryland, the executors of this my last will and testament; * * * and, as I have left to each of my said executors legacies by this will, it is my will that said legacies to each of them respectively shall be in lieu of commissions as such executors * * *."

It will be noted that the will, so far as the bequest to the executors is concerned, is on all fours with the will here involved. The bequest is made in an early part of the will to the parties named as executors without mentioning them as executors. In the clause appointing the executors it is provided that the bequests given them in the earlier part of the will "shall be in lieu of commissions as such executors."

Objections were filed to the probate of this will and Williams was appointed Administrator *pendente lite*. The will was admitted to probate. Williams thereupon qualified as executor and was afterwards allowed the legacy of $5,000. He was also allowed on an accounting by the Orphans' Court $2,945 commissions under the Maryland Statute for his services as Administrator *pendente lite*. Upon appeal, the Court disapproved of the allowance of commissions to the executor for his services as administrator *pendente lite* under the statute, saying (pp. 505, 507, 509):

> There can be no doubt that the legacy was given to Mr. Williams, not as a gratuity, and not unconditionally, but *in lieu of commissions* as executor. Upon this subject the will is explicit. * * * *That legacy was given as a payment for all the labor and services which Mr. Williams might perform in completely settling Mrs. Conine's whole personal estate.* * * * But where he has been bequeathed, in lieu of commissions, a legacy larger than the commissions would amount to, and does as

> administrator *pendente lite*, only that which he was bound to do as executor, *the legacy must be treated as a full compensation for all the labor it was intended to cover*, namely, the entire administration of the whole estate * * *. (Italics ours.)

In *Matter of Runyon's Estate*, 125 Cal. 195, the will provided as follows:

> In lieu of the commissions allowed by law for executors, which I deem insufficient, I do hereby provide that my said executors shall be entitled to receive the sum of $5,000 each as and for full compensation for their services, respectively, as such executors, in addition to their actual expenses.

In this case one executor, with the consent of the other, continued in the actual management of farm properties left by the testator in widely separated parts of the State. Upon the accounting he asked the Court, under the California Code, to make a further allowance for extraordinary services rendered. The Court denied the application, holding that the compensation fixed by the will must be deemed ample for all services rendered, and saying, in its opinion (page 197):

> The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render * * *.

In the case of *In re Hays's Estate*, 183 Pa. 296, there was an appeal from a decree surcharging the ex-

ecutor's account with the amount of commissions charged in excess of the compensation fixed by the will. The provision of the will in that case was:

> To each of the executors of this my last will and testament I bequeath the sum of one thousand dollars, as and for compensation for their services as such executors.

It was held that executors accepting the office with knowledge of the provision of the will fixing their compensation were bound thereby, and that the two executors were entitled to only $1,000 each. The Court, in a well-considered opinion, said (at page 297):

> We held in *Shippen* v. *Burd's Ex'rs.*, 42 Pa. 461, under a will which prescribed the method and the extent of the compensation which was to be received by the executors for all the services to be performed by them, the executors were bound by the provisions of the will in this respect. There was a trust to be executed in relation to certain real estate, and as to this the executors claimed additional compensation because they were acting as trustees which was a service outside of their duties as executors. But we held that although this was a trust the executors were bound to execute it as executors, and it was therefore a part of their duty as executors, and the compensation provided for them as executors must be regarded as conclusive upon them as to all duties which devolved upon them in the execution of the will. We said, "Executing the trust was but executing the will, and

> for this we have seen that provision was made in express words by the testator for the payment of commissions occurring for additional services to be rendered by them (the executors) in executing my will and codicils. The intention of the testator, we think, is clear that for these services the executors are to be paid out of the estate, and not by the devisees." The fundamental principle upon which this decision was based was that the executors, having accepted their office under the will, were bound by its terms in respect of the compensation they were to receive as such.

The testator in the later case of *Sweatman's Estate*, 223 Pa. 552, provided in his will that each of three executors should receive $6,000 "in lieu of all commissions." All three qualified. Four months thereafter one of them died and the Court was called upon to determine whether the representative of the deceased executor should receive the $6,000 in full. The Court held that the representative was so entitled, saying (p. 553):

> We think * * * Mr. Caven's estate is entitled to the $6,000 in full. The testator himself determined the sum that he should receive and took the risk of his executor's illness or death; the executor by accepting the post took with it the chance that the *labor* entailed might be greater than he could reasonably anticipate.
>
> Did the amount named prove to be too small we would be powerless to increase it * * *. And when the executor once qualified as executor,he became entitled to some compensation—

> whether little or much is immaterial; his death did not deprive his estate of his right to *what had been earned*, and it was in lieu of that *compensation* that he was given his *legacy*.
>
> It must be presumed as was said in Harper's Appeal, 111 Pa. 243, that the testator had in mind the possibility that death might reduce the number of his executors and that he considered such a contingency when he fixed the *compensation* to be paid to each of them. (Italics ours.)

In *Connolly* v. *Leonard*, 114 Me. 29, the testator devised real property to his executor and trustee "in lieu of any payment for services as executor or trustee" and further provided that it was so to be accepted and understood by the trustee in accepting it. The question arose whether the trustee was entitled to statutory commissions in addition to the devise. The Court said (p. 31):

> In view of the language used in the will at bar, we have no hesitation in saying that Matthew J. Leonard is not entitled to commissions as executor in addition to the legacy therein provided.

In *Sinnott* v. *Kenaday*, 14 App. D. C. 1, reversed on other grounds, 179 U. S. 606, it was sought to deny commissions to an executrix upon the ground that a bequest of a $5,000 bond contained in the will of the testator was given as compensation. The Court in overruling this contention said (p. 24):

> The bequest of the Richmond bond was to "my wife and executrix" without other desig-

> nation, but nothing to indicate that it was given by way of compensation and to be taken *in lieu of commissions*. The descriptive words used to designate the legatee were entirely natural and proper and were intended as mere *descriptio personae* of the legatee; and if the wife had failed to obtain letters testamentary she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commissions allowed by law. The terms of the bequest will not bear any such construction. (Italics ours.)

In the case of *John L. Batchelder, Petitioner*, 147 Mass. 465, the testator, after making a bequest to his wife, and giving her for life the income from the residuary estate, which he bequeathed to trustees in trust for that purpose, further provided (p. 466): "Upon the decease of my said wife, I hereby give, devise, and bequeath all of said estate so devised and bequeathed to trustees as aforesaid, as follows: $5,000 each to said John L. Batchelder and David O. Paige for the faithful performance of their trust." It appears that the testator and his wife died in the same accident. The trust for her benefit therefore never arose. One of the trustees claimed the bequest, but the Court denied the claim, saying (p. 470):

> The first of the legacies which are given, as we have stated, by the residuary clause, after the death of testator's wife, are gifts of $5,000 each

> to the two trustees for the wife "for the faithful performance of their trust." The words used expressly make the faithful performance of the trust the consideration and the condition of the right to the legacies, and negative the supposition that the legacies are given unconditionally, as marks of personal regard. Even if we should go so far as to say that the gifts of $5,000 are in addition to such ordinary compensation as might be allowed by the court, in view of the provision deducting from gross income all necessary expenses and legal charges incident to the management of the estate, still it is clear that they are compensation and conditioned as we have said. The trust has failed and the legacies fail with it.

It may be contended that plaintiffs in error would have been entitled to the bequests had they not qualified. This is not the law. *Fletcher* v. *Hurd*, 14 N. Y. Supp. 388; 60 Hun, 576. In that case the bequest was of the residue of the testator's estate "to my said executors to be divided equally between them in lieu of compensation for their services in the execution of their trust." The General Term of the Supreme Court for the Fourth Department held that the bequest was intended to compensate the executors, and that one who failed to qualify was not entitled to any part of the bequest, saying (pp. 389, 390):

> If only one qualifies, and the other is not in a position to perform any duties, and does not perform any, can it be said that the testator

> in that event intended, by the use of the expression above quoted, to provide that the one not so qualifying should still have the one-half? *That would convert a bequest in compensation for services into an absolute individual gift.* There is nothing in the will that indicates that such was the intention. * * * The will imposed certain duties, and provided compensation for such duties. The benefit is to be received by the party bearing the burden. (Italics ours.)

See also *Matter of Accounting of Mason, supra.*

It will be further claimed that the bequests to plaintiffs in error were donative and not compensative. The cases cited in the Circuit Court of Appeals in support of the contention—

> *Morris* v. *Kent*, 2 Edw. Ch. 175;
> *Scofield* v. *St. John*, 65 How. Pr. 292;
> *Harrison* v. *Rowley*, 4 Ves. Jr. 212;
> *Angermann* v. *Ford*, 29 Beav. 349;
> *Lewis* v. *Matthews*, L. R. 8 Eq. 277;
> *Brydges* v. *Wotten*, 1 Ves. and Beam. 134—

are readily distinguishable. *Scofield* v. *St. John* is cited and distinguished in *Matter of Hurd, supra.* *Morris* v. *Kent* is an old New York case and of little value in determining a question which arises under later statutes. The other decisions are English cases and clearly inapposite when the difference between the American rule and the English rule is borne in mind. As pointed out above, the office of executor under the English law is an honorary one and the executor or other fiduciary receives no compensation for his services as such. This rule does not now

obtain in America, as we have seen. Moreover, in England, a bequest to an executor is presumed to be—

> given to him in that character and is attached to the office, and it is incumbent on him to show something in the nature of the legacy, or other circumstances arising on the will, to rebut that presumption. (*Halsbury's Laws of England*, Vol. XIV, p. 270.)

Exactly the contrary is the rule in America. (*Matter of Accounting of Mason, supra; Matter of Sprague*, 46 Misc. 216.)

Even under the common law, it has been held that an executor who does not act is not entitled to the legacy (*Abbott* v. *Massie*, 3 Ves. 148) even though prevented from acting by age or infirmity (*Halsbury's Laws of England*, Vol. XIV, p. 271; *Hanbury* v. *Spooner*, 5 Beav. 630; *Calvert* v. *Sibbon*, 4 Beav. 322; *In re Hawkins' Trusts*, 33 Beav. 570). The English Courts have also held that an executor who proved the will without any intention of acting thereunder would be disallowed the legacy.

Harford v. *Browning*, 1 Cox. Eq. Cas. 302.

An examination of these cases indicates that even under the English rule the person designated as executor in order to become entitled to the bequest given to him in his capacity as executor was required to qualify or do some act plainly indicating an intention on his part to qualify and act.

The cases cited by respondents in the Court below as holding that bequests to executors in lieu of compensation abate for an insufficiency of assets are clearly not law to-day. *Richardson* v. *Richardson, supra; Harper's Appeal*, 111 Pa. St. 243.

Heaton in his work on Surrogate's Courts says in this regard (3rd ed., vol. 2, p. 598):

> The sum to be paid for the services of an executor is often fixed by will. When it is specified as for compensation it should not be treated as a legacy unless the will shows an intention to so give it, and the sum should not abate with other legacies.

Furthermore, the cases relied upon by respondents are predicated upon the English rule that an executor is not legally entitled to compensation and that any amount given him by will is necessarily a gratuity. As we have seen, the office of executor in New York is not a gratuitous one. The reason for the rule thus fails and with it the rule itself.

That the testator fully realized the significance of his act in specifying in the 16th paragraph of his will that the bequests to his executors and trustees are in lieu of the statutory commissions to which they would otherwise be entitled would seem to be clearly established by the following circumstance: In *Matter of Vanderbilt*, 68 N. Y. App. Div. 27, the present testator whose will is now under consideration was named as one of the executors and trustees under the last will and testament of Cornelius Vanderbilt. The will provided bequests of large sums of money to each of the persons who later in the will were named as executors and trustees. Included in the will was a direction that the executors should receive no compensation for their services. The Surrogate sustained the action of the transfer

tax appraiser in refusing to deduct, under the provisions of Section 227 (now Section 226) of the Tax Law of the State of New York, the commissions to which the executors would have been entitled by law.

The Appellate Division, First Department, in affirming the order of the Surrogate, said (pp. 29, 30):

> In *Matter of Gihon* (*supra*) it was also decided in effect that commissions allowed by law to executors and trustees should also be deducted in the same manner as United States legacy taxes, but the special provisions of Mr. Vanderbilt's will are such as to render inapplicable as authority what was decided in that behalf in the *Gihon* case. * * * Mr. Vanderbilt in his will provided as follows: "I direct that no compensation or commission as such shall be paid to any living executor or trustee under this will for any services as executor or trustee hereunder." It is obvious that the testator intended that his estate should not be diminished by these ordinary expenses of administration, and it is equally obvious from a general survey of the will that *the legacies given to the executors were not so given in lieu of commissions.* The meaning of section 227, above cited, may be that where legacies are given for the services of executors and are to be a substitute for statutory allowances, an exemption from taxation, to the extent of such legacies, is created; but we can not find from anything in this will that these legacies to the individuals appointed executors were in any way dependent upon or affected by the performance of executorial duties. (Italics ours.)

It is very evident that Alfred G. Vanderbilt, whose will is now under consideration, expressly provided that the bequests were compensation and in lieu of commissions in order that his estate, which was of a considerable size, might have the benefit of the provisions of the tax law referred to, and advantage of the Statute was doubtless taken by respondents as executors of his estate.

CONCLUSION.

If I seem to have argued this case at unnecessary length, it is because it involves, in principle, in this age of large fortunes a substantial sum to the United States Treasury. There is a growing custom for men of large means to fix themselves the compensation of their executors and trustees in order to avoid the large deductions from the amount of the estate which the payment of the statutory fees of executors and trustees would cause. It is for this reason that the so-called bequest in lieu of commissions is generally less than the statutory commission would be. Moreover, there are many lawyers who specialize in acting as executors and trustees in the settlement of estates, and it is conceivable that a very large income of such a practitioner might wholly escape taxation by the simple device of so writing the wills of his clients that he would get his compensation, to which he has a legal right, under a so-called bequest and not by order of the court.

Taxation is a very practical matter. Indeed, it is the most practical matter known to Government. It

cares little for legal forms, or legal expressions, or legal devices. It concerns itself with the substance of the thing upon which it imposes the tax.

Take for example the present case. Mr. Vanderbilt left a very large fortune. Of this the will itself is ample evidence. He made the two respondents his executors and trustees. As such they render important duties and must continue to do so as long as the long-term trusts continue. As such, upon acceptance of the trust, they had a vested right to statutory commissions, and if there had been no statute fixing the commissions on a percentage basis, they could have asked the court to allow them on the basis of a *quantum meruit* reasonable commissions. Assuming that Mr. Vanderbilt left an estate of $25,000,000 they would have thus received, either under the statute or by allowance of court in the absence of a statute, a compensation—not the gratuity of the testator—which would have approximated that given to them by the so-called bequest.

In that event, could it fairly be disputed that their earnings as executor and trustee would be subject to an income tax?

If so, and taxation is a practical matter, how can the taxgatherer be defeated by the simple expedient of the testator giving to them by the so-called bequests that to which in any event they would have been entitled?

I do not contend that every bequest in lieu of commissions is necessarily to be treated as purely compensatory and not *in part* donative.

I doubt whether any general rule in this matter can be laid down, and in each case it must be a question of fact whether the provision was in whole or part compensation and not a gratuity, and the fact must depend to some extent upon the intention of the testator.

This was recognized by the learned judge of the District Court who sustained the Government's contention in this case. In his first opinion he leaned to the view that where a testator made a bequest and declared it to be in lieu of his executor's compensation that it would be "obviously impossible to say whether these bequests were not in part bounty, even if the commissions should turn out much less."

Judge Hand added:

> But if he (the testator) has in fact bequeathed the sum to him as compensation, how can I apportion it partly as such and partly as free bounty? Clearly not, if the language be unambiguous.

Treating the question as one of intention he construed the sixteenth clause as meaning that the legacies were compensation for services to be rendered and therefore concluded that the whole of the legacy must be treated as compensation because the testator had so said.

On further reflection he modified this view in a supplemental opinion by saying:

> In this case, as I said on my original opinion, the question was not argued at bar whether assuming that the legacies were in fact taxable they must be taxable altogether,

> I did consider that question and decided that they were taxable in whole. Subsequent reflection has led me to doubt whether this is necessarily the case, and I am therefore not prepared to give judgment absolute unless the defendants do not choose to answer over. It is in any case enough that the plaintiff is entitled to some relief; that being so, the demurrers must be overruled. If, however, the defendants wish to insist that the legacies are taxable only in part, that part to be ascertained by reference to the amount given as compensation, assuming there is a way of dividing them, they must plead a partial defense.
>
> I have, therefore, signed judgments "respondant over" and the defendants may plead if they will. If they are content to rest their case upon the demurrers, they can allow judgment absolute to pass against them at the expiration of the time to plead over.
>
> Anything I said in my original opinion regarding the impossibility of dividing the legacies for the purpose of taxation must be regarded as not decided until some further argument.

The respondents were thus given the opportunity to show by way of answer and proofs that while the bequest was declared to be "in lieu of compensation," yet as a matter of fact it was in whole or in part a mere gratuity and not given as compensation.

Obviously the respondents could not prove that the bequest was *wholly* a gratuity in view of the plain language of the testator and the fact that in

accepting the benefit of the bequest they waived their statutory right to compensation. Nevertheless, it was still open to them to convince the court as a matter of fact that the bequest was so much greater in amount than any possible compensation could have been that the testator must have had in mind that a part thereof was a gift of affection and not in payment of a service.

This more difficult question is, however, not involved in this case, *for the respondents declined to answer and raise this question of fact,* and thus virtually acquiesced in the conclusion of the District Court that there were no special circumstances in this case to impair the full force of the testator's declaration that the sums he gave were the substitute as compensation for the compensation allowed by statute.

In effect, the respondents thus admit that the bequest was not so disproportionate in amount to the statutory compensation as to justify the belief that in part it was a mere gratuity.

This court will, therefore, assume either—

(1) That the compensation that the respondents received by a bequest was approximately that which they would have received in any event by the statute; or,

(2) That the testator, having in mind the magnitude of his estate and the length of the trusts, himself fixed as just compensation for the respondents' services the sum he gave them.

The question, therefore, remains whether an executor and trustee, who by reason of his skill and

work is entitled to statutory fees, and who upon such statutory fees would be obliged to pay an income tax, can be relieved of such a tax by the unimportant fact that *the testator gave the same recognition to the value of the services as the law would have done in any event.*

So stated, the question hardly admits of doubt, for the law would not permit of such inequality as would exist if one executor paid an income tax upon statutory fees and another executor was exempt from the same tax merely because the testator had directed the payment which the law already required.

For these reasons the Government contends that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated, which would simply mean that *in this particular case* the respondents received the sums upon which they are taxed by way of compensation and not as a gratuity. Other cases arising under different provisions of a will or under different circumstances can be decided as and when they arise.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

PRESTON C. ALEXANDER,
CHARLES T. HENDLER,
Of Counsel.

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THE UNITED STATES OF AMERICA, Petitioner, *v.* HENRY B. ANDERSON.	No. 68.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR FREDERICK L. MERRIAM AND HENRY B. ANDERSON, RESPONDENTS.

These cases are before the Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review judgments of that court (282 Fed. Rep. 851) reversing judgments of the District Court of the United States for the Southern District of New York overruling demurrers by the respondents to the amended complaints of the petitioner (275 Fed. Rep. 109).

Statement.

The cases present the question whether certain legacies bequeathed to the respondents by the late Alfred G. Vanderbilt are taxable as income under the Income Tax Law of 1913 (38 Stat. 114, 166, approved Oct. 3, 1913).

Mr. Vanderbilt died on May 7, 1915, and his will was admitted to probate on June 16th following (R. 2).

The bequests which have given rise to the cases were made by the eleventh article of the testator's will (following provisions for certain members of his family). That article, in its entirety, is as follows (R. 8):

> "ELEVENTH: I give and bequeath to my brother Reginald C. Vanderbilt Five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000), and to Howard Lockwood, One thousand dollars ($1,000).
>
> I give and bequeath to each of those persons who may be in my employ at my farm known as 'Oakland Farm', at Portsmouth, Rhode Island, or on my properties known as 'Sagamore Lodge', Camp 'Kill-Kare', or 'Moose River Tract', or on any of my other property in Hamilton County, New York, or in my stable or garage in the City of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an

amount equivalent to his or her wages for the last year of such period."

In 1915, in the regular course of the administration of the estate, all the bequests made by this article were paid, and Mr. Merriam received the $250,000 "given to him by said will" and Mr. Anderson received the $200,000 "given to him by said will" (R. 2).

Prior to March 15, 1916, the respondent in each case made a return of his taxable income, and paid the tax concededly due from him. Neither included in his return his legacy from Mr. Vanderbilt (R. 3).

The respondents did not return the bequests to them as taxable income because in the law then in force (as in all subsequent laws) Congress not only omitted to include legacies or bequests in its definition of taxable income but expressly provided that "income of a taxable person" shall not include "the value of property acquired * * * by bequest." The definition of what is and what is not taxable under that law is found in section II, B of the statute, the pertinent part of which is as follows:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income de-

> rived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: * * * "

By the sixteenth article of his will Mr. Vanderbilt appointed his brother, Mr. Reginald C. Vanderbilt, his uncle, Mr. Frederick W. Vanderbilt, and Mr. Frederick M. Davies, Mr. Anderson, and Mr. Merriam as executors of and trustees of the trusts created by his will, directed that no bond should be required to qualify them as such, and then added that:

> "The bequests herein made to my said Executors are in lieu of all compensation or commissions to which they would otherwise be entitled as Executors or Trustees" (R. 12).

Mr. Anderson and Mr. Merriam qualified as executors of the will and were acting as such when these actions were begun (R. 2).

Although, of course, it does not appear in the records in these cases it is a fact that like actions against Mr. Reginald C. Vanderbilt and Mr. Frederick W. Vanderbilt are pending, and that Mr. Davies died five days before the death of the testator and his legacy consequently lapsed.

Following an audit of the returns of the respondents, the Commissioner of Internal Revenue notified them that this last quoted provision of the will made their legacies taxable; and upon their refusal to assent to assessments of additional taxes upon the bequests, he caused these actions to be brought.

Contentions of the Parties.

The petitioner contends that the moneys which Mr. Vanderbilt gave to his brother, to his uncle,

and to the respondents, and the moneys Mr. Davies would have received under the bequest to him had he lived a week longer than he did, were not bequests in the current lay or legal sense of the term, or within the meaning of the Income Tax Law, but that the giving of them was merely a testamentary fixing of the compensation to be paid to them for personal services rendered to the estate.

In support of that contention counsel for the Government argue, as they did in the courts below, first, that the word "bequest" as well in the terminology of the law as in its general acceptation implies and includes only an unconditional gratuity, and that it is in such sense that it is used in the Income Tax Law; and second, that in legal intendment the legacies in question were given as a stipulated compensation for personal services actually to be rendered by the legatees in the administration of the testator's estate.

The respondents contend, as they did in the courts below, first, that the legacies so given to them were bequests in the universally accepted as well as the legal meaning of the term, and that it is in that sense that "bequest" is used in the Income Tax Law; and secondly, that even if the Income Tax Law did not in terms provide that these bequests are not taxable income, they would not be taxable because they were not given as consideration for services and were not "derived from labor." (*Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, 517.)

It is stated in the "Conclusion" of the brief for the Government that, in this day of large fortunes, these cases involve, in principle, a substantial sum to the United States Treasury in that if the contentions of the respondents be sustained

and the judgment of the Circuit Court of Appeals be affirmed, "it is conceivable that a very large income * * * might wholly escape taxation by the simple device of so writing wills" that an executor "would get his compensation, to which he has a legal right, under a so-called bequest and not by order of the court." That statement at once not only assumes there is no distinction in law or in fact between a bequest in lieu of commissions on the one hand and a mere testamentary direction for the payment or an award by a court of specific compensation for services actually to be rendered—a distinction which goes to the very root of the cases, as we shall show—but it ignores the most essential practical fact involved in the cases. *A bequest in lieu of commissions is taxable as part of the net estate of the testator under the Estate Tax Law of the Revenue Act of 1921, as it was under the earlier estate tax laws, and if it be taxable also as part of the net income of the legatee under the Income Tax Law, it is subject to a double tax under a single act at rates which in the aggregate are practically confiscatory, as we shall show infra.*

Specifically, then, there are before the Court for consideration the following questions:

(1) Were the legacies given to the respondent's "bequests" in the generally understood and legal sense of the word?

(2) Disregarding the provision of the statute that "property acquired by bequest" is not taxable income, were or were not these legacies given as consideration for services actually to be rendered; or, stated in other words, were they as a matter of fact or of law "derived from labor"?

POINT I.

"BEQUEST" AND "COMPENSATION" ARE USED IN THE ACT OF OCTOBER 3, 1913, IN THE SENSE IN WHICH THEY HAVE BEEN DEFINED BY THE COURTS.

It is asserted, emphatically, by counsel for the Government in the "Conclusion" of their argument (Government's Brief, pp. 33, 34), that taxation, as a practical matter, "cares little for legal forms, or legal expressions, or legal devices," but rather "concerns itself with the substance of the thing upon which it imposes the tax."

Whatever of truth there may be in that broad generalization, certainly it will not be denied that it is a settled principle of law, applicable in the construction of every taxing statute, that in the practical exercise of its taxing power a legislative body is presumed to know the adjudications of the courts defining the terms it employs and is presumed to use language so defined in the sense of such definition; and, therefore, that if the bequests made by Mr. Vanderbilt to the respondents either were bequests in the legal sense of the term, or were not "compensation" within the judicial definition of that word, they were not taxable as income. (*Lessee of Levy v. M'Cartee*, 6 Pet. 102, 110; *Maillard* v. *Lawrence*, 16 How. 251, 261; *Kepner* v. *United States*, 195 U. S. 100, 124; *Norfolk Southern R. R. Co.* v. *Chatman*, 244 U. S. 276, 280, 281; *Towne* v. *Eisner*, 242 Fed. Rep. 702, 704).

POINT II.

"BEQUEST" IN THE LEGAL AS WELL AS THE COMMON ACCEPTATION OF THE WORD INCLUDES EVERY VOLUNTARY DISPOSITION OF PERSONAL PROPERTY BY WILL.

A.

Every voluntary disposition of personal property by will, whether it be conditional or unconditional, or with or without consideration, is a "bequest" in the familiar, everyday understanding of the term and in its legal sense (*Jessup-Redfield's Law and Practice in the Surrogates' Courts,* section 917, p. 1138). That the word is not limited either in its lay or legal meaning to an unconditional or gratuitous transfer, is, and through the whole history of the Law of Wills has been, settled and established.

Thus, for example, the very common bequest in lieu of dower, a legacy conditional upon the surrender by the legatee of her right of dower, is a bequest by the test of every definition of the term. It was so held in *Orton* v. *Orton*, 42* N. Y. (3 Keyes), 486, where the very contention now made by counsel for the Government was repudiated. In that case the testator gave to his wife a legacy in lieu of dower, and then provided that should there be a surplus of his estate after the payment of all legacies, the legatees should share proportionately therein. The executors insisted that the widow was not entitled to any part of the surplus on the ground that a bequest in lieu of dower is not a legacy, and, therefore, she was not a legatee. The court said:

"*Notwithstanding the bequest to the*

wife was declared to be in lieu of dower, it is incorrect to say that it was not a legacy. Such it was in legal as well as common parlance, and it is constantly called by that name in the books. (2 *Williams on Executors,* 1169, 1170; 2 *Redfield on Wills,* 553, n. 25; 1 *Roper on Legacies,* 297, 432; *Wake* v. *Wake,* 1 Ves. Jr. 335; *Williamson* v. *Williamson,* 6 Paige, 298). Every bequest of personal property is a legacy, including as well those made in lieu of dower, and in satisfaction of an indebtedness, as those which are wholly gratuities. *The circumstance whether gratuitous or not, does not enter into consideration in the definition.* It is the synonym of the word 'bequest.' Thus, in Jacob's Law Dictionary, it is defined to be 'a bequest or gift of goods and chattels by will or testament.' In Bacon's Abridgment a legacy is defined, 'a gift or bequest of a particular thing by testament' (Bac. Ab. Legacy). 'The word "devise" is specially appropriated to a gift of lands, and the legacy to a gift of chattels.' (Id. note). *And when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, 'a thing given, either as a gratuity or as a recompense.'* " (487.) (Italics ours.)

In that last quoted sentence of the New York Court of Appeals is the complete answer to the deduction drawn by counsel for the Government from the definitions quoted in pages six to nine inclusive of their brief. If a legacy "in lieu of dower" is a "bequest" in "its ordinary meaning and legitimate effect" (42* N. Y. 486), if one to whom such a bequest is made "obviously" takes as a "legatee" as counsel for the Government admit on page nine of their brief, certainly it

cannot be denied that a bequest in lieu of commissions likewise is a "bequest" in "its ordinary meaning and legitimate effect."

Bequests to creditors upon condition that they be accepted as a satisfaction or in discharge of the testator's indebtedness are of common occurrence. In fact, there is a general rule of construction that presumptively a legacy to a creditor which is equal to or greater than his claim against the testator will be deemed to be in satisfaction of the debt. Out of that rule has grown up an important and very considerable body of law, to be found in reports of hundreds of cases in which there has arisen the question whether in the particular will under consideration there was or was not evidence of a testamentary intention that the legacy should form an exception to the general rule (*Glover* v. *Patten,* 165 U. S. 394, 411; 40 *Cyc.* 1885 *et seq.*) In none of those cases will there be found a suggestion that such a legacy is not a "bequest" in the legal sense of the term, as distinguished from a mere direction to pay the creditor his debt. Indeed, it is an established principle that a direction by the testator that his debts shall be paid negatives the presumption that a bequest to a creditor is conditional upon a waiver of his claim and makes his legacy absolute (*Boughton* v. *Flint,* 74 N. Y. 476, 482; 40 *Cyc.* 1886).

It has been always recognized that such legacies are bequests "in legal as well as common parlance," and they are "constantly called by that name in the books" (*Orton* v. *Orton,* 42* N. Y. (3 Keyes) 486).

So it is of bequests to executors or to trustees in lieu of compensation for their services or "for their care and pains." They have always been "bequests" in any and every sense of the word.

They have been uniformly so characterized and defined by judges and lawyers and text book writers; and as such, therefore, *they abate with other general legacies in case of deficiency of assets.*

In *Morris* v. *Kent*, 2 Edw. Ch. 175, 179, it was said:

> *"A legacy to an executor even expressed to be for care and pains, is not to be regarded in the light of a debt or as founded in contract, or to be governed by the principles applicable to contracts. If it were so, an executor, who takes upon himself the office and discharges its duties, would be entitled to his legacy in preference to all other legacies, even if there were a deficiency of assets to satisfy all of them. But, so far from it, the point has been repeatedly determined and it is now settled law, that a legatee of this description must abate equally with other legatees * * *."*

In *Waters* v. *Collins*, 3 Dem. N. Y. 374, one Waters bequeathed to Collins, $700 "over and above any and all commissions" he might be entitled to receive "upon the condition that said Collins shall accept, qualify and act as executor." In that case Collins was required to do much more to become entitled to his legacy than the executors of Mr. Vanderbilt's will were required to do in order to get absolute title to their legacies, as we shall see. Collins claimed that the bequest to him was compensation for his services and, therefore, did not abate with the general legacies. The court, holding the bequest was a general legacy and subject to abatement, said:

> *"In behalf of Mr. Collins * * * it is urged that the bequest for his benefit is not mere bounty, but is in the nature of*

> *compensation for services that the testator expected him to render, and that, since testator's death, he has in fact rendered in the management of this estate;*
> * * * *The executor's claim to priority because of the supposed consideration for the legacy in his behalf is not well founded.*
> In *Heron* v. *Heron*, 2 Atk. 171, *it was held by Lord Hardwicke that bequests to executors, even though given expressly for 'care and pains', did not differ from general legacies so as to take them out of the ordinary rule in respect to abatement for deficiency of assets.* The same doctrine was asserted in *Attorney-General* v. *Robins* (2 P. Wms. 24); in *Fretwell* v. *Stacy* (2 Ver. 434); and in *Duncan* v. *Watts* (17 Beav. 204). * * *
> I hold that, in case of a deficiency of assets, the two legacies must abate *pro rata.* (*Blower* v. *Morret*, 2 Ves. Sen. 419; *Beeston* v. *Booth*, 4 Madd. 161; *Thwaites* v. *Foreman*, 1 Coll. C. 409; *Wood* v. *Vandenburgh*, *supra*)". (Italics ours.)

In *Clayton* v. *Akin*, 38 Georgia, 320, 195 Am. Dec. 393, one Clayton "gave and bequeathed" to Akin $1,000 "for any extra trouble he may have in executing this my will." Akin claimed that the money so given to him was an expense of administration of the estate and for that reason did not abate proportionately with other general legacies. The court said:

> *"The legacy of one thousand dollars to the executor is, in every aspect of it, a general legacy; and as to abatement, in case of a deficiency of assets, must take its fate as such. It has been argued that the terms of the bequest are such that the legatee, in this case, is not a volunteer, but stands upon the footing of a purchaser. The authorities are abundant against this position*: 2 Wil-

liams on Executors, 1171; *Fretwell* v. *Stacy*, 4 Ves. 434; *Attorney-General* v. *Robins*, 2 P. Wms. 23; *Herron* v. *Herron*, 2 Atk. 171. In all these cases the legacy was for "the care and pains" of the executor—language which is, in effect, the same as is used by Mr. Clayton. It will be observed that this is not a question whether the legacy is a good one, or whether it is dependent on the executor acting, but whether it is a legacy which may be called upon to abate, with other general legacies, on a deficiency of assets. * * * As a legacy, therefore, this must be considered a general legacy, liable, if necessary, to abate as such. *The Court* (below), *in this case, seems to have considered this one thousand dollars as part of the expenses of administration. It is either a legacy or nothing.* * * * Here is a fixed sum of one thousand dollars, given as a legacy. We are not able to see the force of the argument which gives this the dignity of expenses. *It is a legacy, and nothing more, nothing less, given for good reasons and with good purposes, and standing upon the footing of other legacies, given for considerations and motives not amounting to a legal obligation, as past kindnesses, affection, moral obligations, etc.*" (Italics ours.)

In *Turnipseed* v. *Sirrine*, 60 S. C. 272, the Supreme Court of South Carolina *held that a bequest in almost identically the same terms as the bequests to the respondents was a conditional legacy as distinguished from compensation for services.* In that case the facts were that a Mrs. Neblett made a will in which, after making a number of bequests and providing for the disposition of her residuary estate, she appointed Sirrine executor and bequeathed to him

"$1,000, * * * which is to be *in*

> *lieu of all fees* due him for his services in managing and carrying out the provisions of this my last will and testament."

The will was admitted to probate and Sirrine qualified and entered upon the administration of the estate. Thereafter the plaintiff, Mrs. Turnipseed, brought an action to establish a claim to the entire estate upon the ground that the testatrix and she had entered into a contract to make mutual wills. The contract having been established, the court held that Mrs. Turnipseed was entitled to recover the entire estate with the exception of the bequests to which she had assented. Upon a settlement of his accounts as executor Sirrine claimed that he was entitled to the bequest of $1,000 to him, to which Mrs. Turnipseed had not assented, because it was to be accepted in lieu of fees. The court denied his right to the legacy but did allow him the *prescribed statutory commissions* for his services as executor, saying (60 S. C. 272, 290):

> "As I announced early in this opinion, the decision of this case by the Supreme Court (on a former hearing) decided that all legacies except those consented to by the plaintiff were null and void. *This is a legacy.* It may be said that, because it is therein provided that such legacy shall be accepted in lieu of all fees due to the executor, it may be allowed to operate. Suppose it had been $5,000 or $10,000, *with the same condition annexed*, would that not be a palpable evasion of the plaintiff's right to the ownership of the whole estate, after the payment of the legacies * * * to which Mrs. Turnipseed assented? * * * Let the executor receive his legal commissions."

Additional cases of like import might be cited,

but the foregoing and other authorities *infra* establish, it is submitted, beyond question that the legacies given to the respondents and those given by the testator to his brother and to his uncle, and that which he would have given to Mr. Davies had the latter lived a few days longer than he did, are bequests in the generally accepted and judicially sanctioned meaning of the word. Not only are they so defined by the courts and so referred to in everyday speech, but they are called by that name in the amended complaints in these actions and throughout the brief of counsel for the Government, because there is no other word that is descriptive of them; and if "bequest" in its legal and in its ordinary sense means only an unconditional gratuity, "presupposes a bounty", "donative" and not "compensative in its significance", it follows necessarily that the bequests to the respondents were conditional gratuities, donative and not compensatory, as we contend *infra*.

In spite of all these authorities, in the opinion of District Judge Learned Hand it is said of these bequests (R. 15):

> "If they were true legacies, he (they) would get them whether he (they) qualified or not as executors."

This is at once a statement by implication, first, that it was essential for the legatees to qualify as executors and as trustees in order to get their legacies; and second, that these "legacies" are bequests in form only, but are not such as a matter of law. We say this because heretofore bequests have been classified as absolute or conditional, vested or contingent, but never as "true" or "false," and we assume the learned District Judge did not mean to introduce a new classifica-

tion into the terminology of wills, but rather that he inaccurately expressed his real thought.

But neither assumption was correct. That it was not essential for the legatees to qualify in order to become entitled to their legacies appears *infra;* and that a bequest to one in lieu of compensation for his services, which is conditional only upon his willingness to qualify and serve if circumstances permit him to do so (see *infra*) is a "true" bequest, the cases cited plainly show.

B.

The universally accepted and judicially sanctioned meaning of the term "bequest" being a disposition by will of personal property, either absolute or conditional, the word must be deemed and must be construed to have been used in that sense in the Income Tax Law, and as there used, to include every such disposition, we repeat, for

> "It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body" (*Kepner* v. *United States* 195 U. S. 100, 124).

Not only is that presumption "resistless except against an intention imperatively clear" (*Lynch* v. *Turrish*, 247 U. S. 221, 230), but the rule is particularly applicable to the construction of the Income Tax Law in view of the fact, which, of course, Congress knew when the law was passed, that:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to em-

brace matters not specifically pointed out" (*Gould* v. *Gould*, 245 U. S. 151, 153).

And in view of the further fact that "it would have been easy for Congress to express a purpose to tax property" acquired by bequest conditional upon the happening of any event or the performance of any act, had such a purpose existed (*United States* v. *Field*, 255 U. S. 257, 264).

The learned District Judge, in support of his opinion "that all bequests are not exempt" and so of his inferential holding that "bequest" is not used in its usual sense in the statute, said in his original opinion that if "a man agreed to leave another a legacy if he would take care of him while he lived" the legacy would be a "bequest", but that no one would suppose it would not be compensation for personal services which would be taxable (R. 14). Possibly so, but only because the testator's prior contractual obligation, discharged by the will, would be a *debt*, would be collectible even if the obligor did not provide for its payment by will, and the money or property agreed to be paid would be "acquired by contract" and not by bequest. (*Matter of Baker*, 83 App. Div. 530; aff'd 178 N. Y. 575; *Matter of Vanderbilt*, 184 App. Div. 661, 667; aff'd 226 N. Y. 638).

Appreciating the impediment of these cases to the claim that in this particular statute "bequest" was used in a qualified or limited sense, and not in its universally understood meaning, counsel for the Government invoke the rule of *noscitur a sociis* to support their contention.

That rule is not applicable in the present case.

Because the word "bequest" immediately follows the word "gift" in the statute, it is said that "bequest" should be taken to mean only an abso-

lute or unconditional bequest, or a bequest without consideration of any kind. That argument takes it for granted that every gift that is conditional, not absolute, is taxable as income—an assumption for which there no justification. But however that may be, while it is true that "the meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it" (29 *Cyc.* 1065), the rule is applicable only to determine the sense in which an ambiguous word, a word of double significance, has been used, and cannot be invoked to modify or qualify, by inference or implication only, the established general and legal meaning of a word in general use. All such words must be held to have been used in their accepted meaning unless an intention to use them in a different sense is clearly and unequivocally expressed (*Maillard* v. *Lawrence*, 16 How. at p. 261; *Kepner* v. *United States*, 195 U. S. at p. 124). Moreover, when the bill which finally became the 1913 Income Tax Law was first introduced, the clause in question read as follows: "Including the income from but not the value of property acquired by bequest, devise, or descent." Not until the bill reached the Senate was the word "gift" inserted in that clause (*Congressional Record*, Vol. 50, Pt. IV, p. 3775). Obviously, "bequest" does not "take its color" from a word that was subsequently introduced into the bill.

It was also argued in the courts below, and it may possibly be suggested on the oral argument before this Court, that the provision that income does not include the value of property acquired by bequest is a grant of an exemption or immunity, and consequently that the rule that a grant of exemption or immunity from taxation is to be construed against the taxpayer and in favor of

the Government is applicable and an authority for the narrow definition upon which the Government relies. But clearly that principle of construction has no application to the question in these cases, except, indeed, on a theory which in itself refutes the contention of the Government.

"Everything that comes in" to one is not necessarily income within the meaning of the Sixteenth Amendment (*Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 335). And the first problem that confronted Congress when it enacted the Income Tax Law was to define taxable income, to specify, to point out, what receipts should and what receipts should not be regarded as income for the purpose of taxation. It did that by providing in section II, B that "Subject only to such exemptions and deductions as are herein allowed" (and which are specified in subsequent provisions of "B" and in "C") the income of a taxable person shall include gains derived from labor (including personal service of any kind), or from capital, or from both labor and capital combined, (*Eisner* v. *Macomber*, 252 U. S. 189, 207; *Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, 517) "including the income from but not the value of property acquired by gift, bequest, devise, or descent." (See also *Gavit* v. *Irwin*, 275 Fed. Rep. 643, 646). That is, Congress, in defining taxable income, excepted from its definition (*Gould* v. *Gould*, 245 U. S. 151) legacies or bequests, for, of course, the words "but not" as used here are words of exception. (*E. H. Rollins & Sons* v. *Board of Com'rs*, 199 Fed. Rep. 71, 78, citing I Words & Phrases, p. 926; and 1 Words & Phrases, 2nd Series, p. 541). In interpreting these words of exception, the Government is not entitled to insist upon a "strict construction of

them", for as this Court said in *Eidman* v. *Martinez*, 184 U. S. 578, 583:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty, *Warrington* v. *Furbor*, 8 East, 242, 247; *Williams* v. *Sangar*, 10 East, 66, 69; *Denn* v. *Diamond*, 4 B. & C. 243, 245; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Doe* v. *Snaith*, 8 Bing. 146, 152; *Wroughton* v. *Turtle*, 11 M. & W. 561, 567; *Gurr* v. *Scudds*, 11 Exchq. 190, though the rule regarding *exemptions* from general laws imposing taxes may be different. *Cooley on Taxation*, 146; *In Matter of Enston*, 113 N. Y. 174, 177."

That the words "but not the value of property acquired by gift, bequest, devise or descent" are words of exception and not of exemption, and that if they are words of exemption they at once make an end of the Government's case, will appear clearly also from a momentary consideration of the meaning of "exemption" as used in tax laws.

> "The term 'exemption' presupposes a liability, and in the law of taxation it is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment." (37 *Cyc.* 884; *Foster* v. *City of Duluth*, 120 *Minn.* 484, 485; *Matlack* v. *Jones*, 2 Disn. (Ohio) 2, 4.)

The only gains made liable to tax being gains derived from labor or capital or both, the "presupposed liability," if any, to which the bequests

in question would be subject, were it not for the assumed "exemption clause", would arise under that part of the definition of income which provides that taxable income shall include gains derived from compensation for personal services. And it is the claim of the Government that they are taxable because they were so derived. Therefore, assuming the clause in question is an "exemption" clause, the law as applied to this case provides that taxable income shall include all gains derived from compensation for personal services *except property acquired by bequest.*

It is submitted, therefore, that the word "bequest" in the universally accepted meaning of the word, whether in common usage or the terminology of the law, includes each bequest in question, that by every applicable rule of statutory construction the word was used in that sense in the statute now before the Court, and consequently, that the moneys received by the respondents under Mr. Vanderbilt's will were expressly excepted by Congress from the statutory definition of taxable income.

POINT III.

THE LEGACIES TO THE RESPONDENTS WERE CONDITIONAL BEQUESTS. THEY WERE NOT COMPENSATION FOR PERSONAL SERVICES.

If the clause of the statute particularly discussed in the preceding point be wholly disregarded as a factor in these cases the legacies now before the Court would not have been taxable as income.

The Government claims that the giving of the

legacies to the respondents was a mere testamentary fixing by the testator of compensation to be paid to them for services actually to be performed by them as executors and trustees. And it is clear that they cannot be taxed on any other theory. This theory is untenable because the bequests were not compensatory; they were donative.

In their argument that the provisions for the legacies in question were in effect merely offers of compensation for personal services to be rendered, counsel for the Government, it is submitted, have disregarded the legal definition of "compensation"; have relied upon cases which deal with unrelated matters as if they were *in pari materia*, and have in substance contended that a testamentary direction for the payment of specific compensation to be paid only if earned, and a bequest upon condition that the beneficiary assume the executorial office if, but only if, he be able to do so, are one and the same thing. They are not one and the same thing in principle or in legal effect.

To compensate means, of course, to make a reward for, to recompense; and "compensation" as it is used in the statute means "consideration" (*Kirkwood* v. *Soto*, 87 Cal. 394, 396, 398; New Standard Dictionary).

The phrase in the statute "compensation for personal service of whatever kind and in whatever form paid" immediately follows and is intended to supplement "salaries," which latter is generally understood to refer to periodical payments made as compensation for regular employment (*Benedict* v. *United States*, 176 U. S. 357, 360; 34 *Cyc.* 1826), and "wages," which is generally applied to payment for manual labor (*Matter of Stryker*,

158 N. Y. 526). Obviously, the expression contemplates and was intended to cover payments under contracts of employment, express or implied, and was incorporated in the statute to reach all *forms* of payment for service rendered which possibly would not be included in the preceding terms of more or less limited scope.

But the fact that broad terms were used to catch every kind of service and every form of payment, does not affect the further essential factor that whatever is sought to be taxed under that phrase must be a consideration for work performed or to be performed, must "be derived from," must "proceed from," must "flow from" labor. (*Eisner* v. *Macomber*, 252 U. S. 189; *Gould* v. *Gould*, 245 U. S. 151; New Standard Dictionary).

If there ever was any doubt about this, it is settled by the judicial definition of income that is taxable under the Sixteenth Amendment and under the Income Tax Law.

As laid down by this Court, income within the purview of the Constitution, is defined to be: "* * * The gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." *Eisner* v. *Macomber*, 252 U. S. 189, 207, citing *Stratton's Ind.* v. *Howbert*, 231 U. S. 399, 415, and *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185. See also *Gavit* v. *Irwin*, 275 Fed. Rep. 643, 645.

Therefore, in these cases, unless actual rendition of services as executors and trustees was essential to the vesting of the right of the respondents to their legacies—unless the legacies were actually derived from labor—they were not compensation for services within the meaning of the statute.

The cases cited above establish clearly enough, it would seem, that the legacies to the respondents were "acquired by bequest," and that they did not "proceed from labor."

The substance of the argument that these bequests were not "true" legacies, but were only a stipulated consideration for labor, will be found in the first paragraph of the original opinion of Judge Hand (R. 14), quoted on page sixteen of the Government's brief.

The argument is as follows: When Mr. Vanderbilt provided that the legacies should be "in lieu of all compensation or commissions" to which the legatees would otherwise be entitled, he could only have meant to substitute the legacies for their statutory compensation. "If a substitute, the legacies must themselves have been compensation, and since commissions would certainly have been for 'personal services,' the substitute itself was the same."

In short, the argument comes to this: Inasmuch as statutory commissions could have been *earned* only by the performance of executorial and trustee duties, anything given to take the place of such commissions must necessarily be so ***earned.***

Certainly it does not follow that because statutory commissions are paid as compensation for service, that everything that is given "in lieu" or "in place" of or as a substitute for commissions necessarily is given as consideration for such services. The words themselves primarily mean something different. A bequest in lieu of dower is not dower (pp. 8, 9). It is something quite different from dower. Alimony is not income, because it is not derived from the capital or labor of the recipient (*Gould* v. *Gould*, 245 U. S. 151). But income from a trust fund to be paid to the beneficiary of the trust "in lieu of alimony" is

taxable. (*Treasury Department, Cumulative Bulletin,* July, 1921, p. 190, Ruling No. 45-21-1910, O. D. 1092). If the reasoning in the opinion of the District Court be sound, trust income in lieu of alimony would be alimony and therefore not taxable.

In other words reasoning based on supposed ultimate equivalents is not sound.

So, the question whether these bequests are income (without regard to the exception clause), turns not on the fact that they were stated to be in "lieu of" or a "substitute" for commissions; but upon the question whether as a matter of law they were consideration for services to be rendered.

We submit there can be no question as a matter of settled law, that these legacies were not stipulated consideration for services.

In *Williams on Executors* (6th Am. Ed., Vol. II, 1394), in the section dealing with conditional legacies, it is stated as a general principle that *if an executor unequivocally manifests an intention to act in the executorship, that will be a performance of the condition upon which his legacy depends although he be prevented by circumstances from actually serving.*

All cases in which the question has been discussed are to the same effect.

In *Morris* v. *Kent, supra,* the court, after stating that a legacy to an executor even when expressed to be for care and pains is not to be regarded in the light of a debt, or as founded in contract, or to be governed by the principles applicable to contracts, but is a conditional legacy, further said (2 *Edw. Ch.* 179):

> "When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question

> generally has been upon the sufficient assumption of the character to entitle the party to the same. *The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the Will with a bona fide intention to act under it, or unequivocally manifest an intention to act in the executorship,* as, for instance, by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office." (Italics ours).

In *Scofield* v. *St. John*, 65 How. Pr. 292, the testatrix gave to each of her executors $1,000 "in addition to the commission or allowances they would be entitled to by law" as such executors. After the will had been offered for probate, but before it was proven, one of the executors died, and his representatives claimed and were allowed the $1,000 bequest to him. The court said (pp. 294-6):

> "The disposition of the Court is to uphold the gift, when it can be plainly seen that the legacy was not made to the executor strictly as such, though he has not acted or shown a dispositon to do so. And in the cases where the gift was not absolute, but conditional, to uphold the same, if the executor has manifested an unequivocal intention to act, and has done all that he could in the direction of accepting the office and the trusts, and has been prevented by death from fully clothing himself with all the power needed through an actual probate of the will. * * * It is urged, however, that the legacies could only be taken by such of the executors as were entitled to legal commissions, and that a failure to earn the commissions would of itself disentitle the person so failing to the legacy.
>
> I am not prepared to place so narrow a

construction upon this legacy. The gift is independent of the commission and in addition thereto. It does not necessarily follow that the condition to receiving the legacy is a lawful claim to commissions. But otherwise I conclude that an acceptance of the trust, and the performance of acts which clearly show an intention to assume all the responsibilities and duties of the office, would be sufficient to entitle the representatives of the deceased executor to the legacy, although they might not have a legal claim for commission."

In *Harrison* v. *Rowley,* 4 Ves. Jr. 212, the testatrix made a bequest to each of her executors "for his care and loss of time" in the execution of the trusts reposed in them. One of the executors survived the testatrix so short a time that he was prevented from joining with the others named as executors in proving the will, but concurred with them in giving directions for her funeral. It was held that his personal representatives were entitled to the legacy in full, the Master of the Rolls saying: "The only question is, whether this executor has demonstrably shown his intention to act in the execution of the trust."

In *Angermann* v. *Ford,* 29 Beav. 349, the testator bequeathed a legacy of £1,000 to each of his executors. One of them renounced, but subsequently, six years later, withdrew his renunciation and qualified. It was held he was entitled to his legacy, the Master of the Rolls saying that in his opinion the legatee "has fulfilled the conditions essential to entitle him to his legacy."

Lewis v. *Mathews,* L. R. 8 Eq. 277, is another case in which a like conditional legacy was held to have become absolutely vested although the legatee rendered no personal service whatever in the administration of the estate. In that case the

testator bequeathed to his executors legacies for their trouble in the execution of the trusts of his will. In a subsequent part of his will, he appointed two persons executors. One of them died during the lifetime of the testator. At the death of the testator the other person named as executor was living in Australia, where he continued to reside until his death. He never qualified as executor, but did send to England a power of attorney to another to administer the estate. It was held that he had sufficiently shown an intention to act as executor to entitle his representatives to the legacy, although he personally had done nothing more than to indicate such a purpose.

In *Brydges* v. *Wotton*, 1 Ves. & Beam. 134, a legatee who had been named as trustee and to whom had been given a legacy as a token of regard and recompense for his trouble died nineteen months after the death of the testator without having acted at all, and *he was held to have become entitled to his legacy in the absence of any refusal or neglect to act.*

Thus it is the settled rule of law that upon the strictest construction of the rights of the legatees here, subsequently named as executors and trustees, their bequests were conditional only upon their being ready and willing to assume the executorial office, provided circumstances permitted them to do so; and that to entitle them to the legacies it was not required of them that they should render services for which (in the absence of the bequests) they would have a legal claim for compensation.

Commenting upon these cases, the learned District Judge said that it seemed to him to make no difference whether the bequests in question were regarded as payable merely on condition of qualification (they might have become so with-

out qualification, it will be noted), or only for services rendered, because in either case, he said, the bequests are equally "compensation for personal services." To support that opinion he suggests the hypothetical case of a master who pays his servant in advance, trusting the servant will live to complete his services, and asks "Is the hire not a 'compensation for personal services?'" (R. 15).

The answer is obvious and supplies the test by which to settle the controversy between the Government and the respondents. In the hypothetical case stated in the opinion of the District Judge, if the servant had died before rendering any service the master could have recovered from the legal representatives of the servant, in an action for money had and received, the entire amount paid, on the ground that there had been a failure of consideration, in spite of the fact that the services were unperformed through no fault of the servant (*Bean* v. *Carleton*, 12 N. Y. Supp. 519, aff'd. 126 N. Y. 642; *Wheeler* v. *Board*, 12 Johns. 363; 27 Cyc. 855). *On the contrary, inability of a legatee to enter upon the performance of services as executor would not prevent the absolute vesting of a bequest to him "in lieu of commissions"* (*Morris* v. *Kent*, *Scofield* v. *St. John*, *Harrison* v. *Rowley*, *Angermann* v. *Ford*, *Lewis* v. *Mathews*, *Brydges* v. *Wotton*, *Waters* v. *Collins*, *Turnipseed* v. *Sirrine*, *supra*).

As we have said before, Mr. Davies, to whom a bequest of $500,000 was made by the eleventh article and who was named as executor in the sixteenth article of Mr. Vanderbilt's will, died five days before the death of Mr. Vanderbilt. Had Mr. Davies lived a week longer than he did and on his deathbed been apprised of his appointment and upon receipt of that information had

said he would serve as an executor if he should become able to do so and then had died, his legal representatives would have been entitled to the full five hundred thousand dollars. Could anyone seriously have made a claim that his estate would have been bound to pay an income tax on that money on the ground that it had been "derived from labor?"

Mr. Frederick W. Vanderbilt, Mr. Reginald C. Vanderbilt, and the respondents offered the will for probate. Had all four of them died in common disaster before the formalities of probate were completed their representatives respectively would have been legally entitled to receive from the administrators with the will annexed, $200,000, $500,000, $200,000 and $250,000 respectively. Could it then have been contended that such legacies would not have been "acquired by bequest" within the meaning of the law, or that they would have been "derived from personal service"? Surely, it never would have entered the mind of any Government official to make any such claim. And certainly the fact that they have not died and have kept faith with their testator by serving his estate does not affect either the nature of their right or their obligation under the Income Tax Law.

Of course, it is not contended by the respondents that all testamentary provisions for payments to executors and trustees are of like character. There are cases in which such provisions are not "bequests" but plainly constitute consideration for services actually to be rendered. Such are *Matter of Tilden*, 44 Hun, 441, *Richardson* v. *Richardson*, 145 App. Div. N. Y. 540, and other like cases relied on by counsel for the Government in their argument.

In *Matter of Tilden* (Government's Brief, pp.

17, 18), the testator "in lieu and exclusion of all other commissions and compensation" authorized his executors to receive from his estate, on certain sums collected by them one per cent. and on other sums five per cent. The executors received $65,000 in payment of certain United States bonds, and upon their fifth accounting had accounted therefor and been allowed one per cent. commission thereon. On their sixth accounting, they charged the estate with the difference between the one per cent. allowed and five per cent. on the same amount. The Surrogate held that they were entitled to the five per cent. and were not precluded from claiming it on the sixth accounting in spite of the fact that they had been allowed one per cent. on the fifth accounting, basing his decision upon the ground that the provision for the executors was a legacy and a legacy was not discharged until paid. The General Term agreed that the executors should have been allowed five per cent. in the first instance but held that the decree entered upon the prior accounting was conclusive against them, saying in part:

> "*The learned Surrogate has based his decision in reference to this matter upon the ground that this compensation provided for in the will in excess of that allowed by law, is looked upon as a legacy, and a legacy is not discharged until paid. But it does not seem to us that this is a correct view. The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum*" (44 Hun, 441, 444).

That provision was compensation and not a legacy because it was payable only for and in the event of performance of specified services.

The difference between such a provision and a conditional bequest in lieu of commissions is well illustrated by *Matter of Brigg*, cited by the Government in the courts below. There the testator named certain persons testamentary guardians of his children provided his wife should not survive him, and directed that each guardian should receive for such services as he might be required to render the sum of $500. The testator's wife survived him. None the less, each of the persons named as guardian claimed the $500. The claim was denied, the court saying (39 App. Div. N. Y. 485, 488):

> "*But the compensation was fixed only for such services as they might be required to perform as guardians of the estate of the two children, and not as a legacy;* and it is quite clear from those words that the testator did not intend the money should be paid to them unless they *actually performed*, in the capacity of guardians, such services as guardians would naturally be expected to perform during the minority of their wards" (Italics ours).

Richardson v. *Richardson*, 145 App. Div. N. Y. 540, (Government's Brief, pp. 18, 19), is of the same character. There a testator appointed his nephew and niece executor and executrix of his will, directed that they should hold his library in trust for a certain town, and added "my nephew and niece are to have one hundred and fifty dollars each for this work. Likewise, * * * to receive five hundred dollars each to be executor and trix of this, my last will and testament." The assets of the estate being insufficient to pay all legacies, there arose the question whether the "executors' compensation shall be paid in full or abate ratably with the legacies"—

in other words, whether the provision in question was a fixed consideration for services or a bequest. It was held that the executor and executrix, having fully performed the services stipulated in the will, were entitled to the specified compensation without reduction because the provisions for them were not legacies. The court said in part (pp. 543, 544):

> "In each legacy the testator used the words 'I give.' He does not use this term or the word 'bequeath' in directing compensation for his executors. He does not characterize it as a gift but as compensation: they 'are to have One hundred and fifty dollars each for this work * * * and to receive Five hundred dollars each to be executor and trix.' * * * As was said in *Matter of Tilden* (44 Hun, 441, 444), in which the Surrogate's Court had held that a similar compensation provided in a will in excess of that allowed by law was a legacy: 'The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum.' *The compensation provided by the will is not a legacy, and does not abate with the legacies, but is compensation carefully determined by the testator, and directed to be paid for the services to be rendered, and is, therefore, to be paid in full.*" (Italics ours.)

Matter of O'Donohue Estate, 115 N. Y. Misc. 697; *Matter of Runyon's Estate*, 125 Cal. 195; In re *Hay's Estate*, 183 Pa. 296, *John L. Batchelder, Petitioner*, 147 Mass. 465, cited on pages 20, 21, 23 and 27 of the Government's Brief, are similar cases.

Obviously, there is a broad and fundamental difference, both at law and in fact, between such

cases as *Matter of Tilden, Matter of Brigg, Richardson* v. *Richardson* and like cases on the one hand and *Morris* v. *Kent, Scofield* v. *St. John, Clayton* v. *Akin, Harrison* v. *Rowley,* and like cases on the other hand.

In each of the former class of cases, the testator himself fixes what he considers a proper charge for work to be done and directs that the amount so fixed be paid for such work. In each such case payment involves and requires actual performance of the specified services as a *quid pro quo,* and the right of the appointee is in fact contractual and based on actual service.

In each of the latter class of cases the testator in terms makes a "gift"—a "bequest." Such a gift or bequest is not, in fact or in law, a direction for the payment of a fixed compensation for services actually to be rendered, but is a donative provision, made as a mark of affection or a token of gratitude to the object of the testator's bounty, conditional only upon the legatee's willingness to qualify as executor if he be able to do so. And, therefore, the law does not impose upon the donee in any such case a contractual obligation to serve or earn as a condition precedent to the receipt of his legacy—does not apply to the determination of his right principles applicable to contracts—but deals with it in the same manner that a legacy conditional upon any other fact or act is dealt with.

Of course, it is always open to a testator to provide that the executors of his will shall not be paid the usual statutory allowances for their services; and not infrequently there has arisen the question whether or not a testator has indicated in his will an intention that his appointees should serve without such compensation. It has been

uniformly held that the making of a conditional bequest in lieu of commissions is evidence of a purpose on the part of the testator that his executor shall not receive such statutory allowances. It is true that in certain cases in which that question has arisen, the courts have not always kept clear the distinction between a testamentary offer to an executor of a specific compensation for his services and a legacy upon condition that the legatee assume the office of executor if he be able to do so. In some of the cases a bequest in lieu of commissions has been referred to as if it was at one and the same time conditional upon the legatee's willingness to serve as an executor and consideration for services actually to be rendered by him as such. (See *Renshaw* v. *Williams,* 75 Md. 498; *Sweatman's Estate,* 223 Pa. 552; *Fletcher* v. *Hurd,* 60 Hun, 576, cited on pages 21, 25, 28 of the Government's Brief.) In no such case has it been held that such a conditional bequest and such an offer of payment are of like legal nature or effect. In no one of the cases in which such provisions have at times been confused was it important whether the particular provision under consideration was one thing or the other. If it was either, it was evidence of the testator's intention that his executor should not have commissions in addition to the testamentary provision for him. That was the only question at issue, and consequently much of the language of the opinions in certain of the cases cited by counsel for the Government is *obiter dicta* and is not helpful in these cases.

In every case that we have been able to find in which there has arisen the question whether a bequest in lieu of commissions abates with other general legacies or whether a

bequest in lieu of commissions is an expense of administration of the estate, it has been held that the legacy does abate and that it is not an expense of administration. (*Waters* v. *Collins, Clayton* v. *Akin, Turnipseed* v. *Sirrine, supra*). Those cases, of course, are exactly in point, for *compensation* for services of an executor always is an ordinary expense of administration and always is payable in full, without abatement.

It is submitted, therefore, that the bequests to the respondents did not proceed from labor and were not compensation for service.

POINT IV.

IF THE BEQUESTS TO THE RESPONDENTS BE HELD TAXABLE AS INCOME, BEQUESTS AND DEVISES OF MONEY AND OTHER PROPERTY "IN LIEU OF COMMISSIONS" WILL BE SUBJECT TO DOUBLE TAXATION UNDER THE REVENUE ACT OF 1921 AND UNDER EARLIER SIMILAR LAWS, FOR MONEY AND PROPERTY SO BEQUEATHED AND DEVISED ARE TAXABLE UNDER THE ESTATE TAX LAW PROVISIONS OF THAT ACT AND UNDER THE EARLIER ESTATE TAX LAWS. CONGRESS CLEARLY DID NOT INTEND SUCH DOUBLE TAXATION.

That the distinction between a conditional bequest in lieu of commissions and a testamentary direction for the payment of specific compensation for services actually rendered by an executor is not technical only but substantial, and that recognition of it is essential to a proper administration of the present revenue act and earlier like laws, is, it is submitted, beyond question.

In the course of the debate in the Senate when

the Act of October 3, 1913, was under consideration, it was clearly indicated by Senator Williams that one of the reasons for excepting devises and bequests from taxation as income was that they were "to be reached by an inheritance and legacy tax" and that they are "reached in nearly all countries in that way." (*Congressional Record*, Vol. 50, Pt. IV, p. 3839.)

Putting aside the question whether Congress has power to impose an income tax on property "acquired by bequest," Senator Williams' statement was at once an explanation and a prophecy; for ever since September 8, 1916, all property acquired by devise or bequest has been "reached" by an Estate Tax Law.

Article I of the Revenue Act of 1921 contains the present Income Tax Law, Article IV of that Act, the present Estate Tax Law. They are companion pieces and there can be little doubt that they represent a fixed and permanent part of the policy of the Government in the matter of general taxation.

Obviously Congress did not intend to tax under the Income Tax Law property that at the same time is subject to tax under the Estate Tax Law as part of a decedent's estate. It certainly must be assumed that a legislative body does not intend to tax the same property or the same thing twice at one time under one and the same law, in the absence of so clear an expression of such a purpose that the statute cannot be construed otherwise (*Crocker* v. *Malley*, 249 U. S. 223, 233).

And yet the contention of the Government, in its last analysis, is that Congress did intend just that thing in respect of bequests like those given by Mr. Vanderbilt to the respondents.

The Estate Tax Law (Section 401) imposes a

tax upon the transfer of the *net estate* of every decedent. The tax imposed is computed at graduated rates, so much of the net estate as exceeds ten million dollars being taxed at twenty-five per cent.

It is provided in the Estate Tax Law (Section 403) that the value of the taxable net estate shall be determined by deducting from the value of the gross estate certain items. Among those deductions the only ones that could possibly be claimed to include such bequests as those in question here are: "Such amounts for * * * administration expenses * * * as are allowed by the laws of the jurisdiction, * * * under which the estate is being administered."

But that such bequests are not administration expenses has been frequently held, as we have seen. (*Waters* v. *Collins; Clayton* v. *Akin; Turnipseed* v. *Sirrine, supra.*) Therefore, they are taxable under the Estate Tax Law. If taxable as income under the Income Tax Law as well they are twice taxable under the statute at one time. Not only that but the aggregate of the taxes under the two laws might practically exhaust the whole of a residuary estate. As an illustration of this, suppose Mr. Vanderbilt had devised and bequeathed his residuary estate to his two younger sons, appointed them co-executors, with the respondents, of his will (as he probably would have done had those sons been of age), and provided that the devises and bequests to the several executors were in lieu of compensation or commissions, and then had died during the year 1921. It is not an uncommon thing for a testator to provide that the devise and bequest of his residuary estate shall be accepted in lieu of commissions. *Fletcher* v. *Hurd,* 60 Hun, 576, cited by counsel for the Government is an in-

stance. Now it is assumed by counsel for the Government, for purposes of argument, that Mr. Vanderbilt left an estate of $25,000,000. Had that been the fact his residuary estate would have amounted to about $15,000,000, as the Court will note upon an examination of his will; and on that assumption, in the supposed case the executors of Mr. Vanderbilt's will would have been required to pay out of the residuary estate an estate tax of $2,931,500, and his sons would have had to pay out of the same residuary estate income taxes of at least $8,400,000 in round figures, a total of about $11,331,000 out of $15,000,000.

Apparently appreciating that a construction of a statute that would work out any such result in any case is untenable, the Solicitor General, at the conclusion of the Government's brief, says that he does not contend that every bequest in lieu of commissions is to be treated as purely compensatory and not in part donative; expresses the view that in each case the question whether a legacy of that sort is income in whole or in part is a question of fact which must depend "to some extent upon the intention of the testator; says that opportunity was given to the respondents to show as a matter of fact that their bequests were given wholly or in part as a gratuity and not compensation; urges that it was open to them "to convince the court as a matter of fact that the *bequest* was so much greater in amount that any possible *compensation* could have been that the testator must have had in mind that a part thereof was a gift of affection and not in payment of a service" (italics ours), and concludes that as they did not undertake to do that, they have in effect admitted that the bequests were given and were accepted as compensation. (Government's Brief, pp. 34-37).

To these suggestions there are several answers:

In the first place, the substantial allegations of the amended complaints are that during the calendar year 1915 the respondents received the legacies *given* to them by Mr. Vanderbilt's will, that under the terms of the will such legacies were *in lieu* of all compensation or commissions to which the respondents would otherwise be entitled as executors or trustees and, *therefore*, were taxable income (R. 2, 3); that is, the theory of the amended complaints is, and the argument of the Government up to this time has been, that, as a matter of law, a bequest to an executor in lieu of commissions is "income." The moment it is admitted that whether such a bequest is income in whole or in part is a question of fact in each case, depending upon the testator's intention to be ascertained by evidence outside the will, the theory of the amended complaints and all preceding argument in support of them fall to the ground and the burden is on the Government to plead and prove that the particular bequests involved in these cases were wholly or to a specific amount taxable as income. It is not upon the respondents to establish affirmatively that the bequests were not so taxable.

In the second place, even if it were permissible to go outside the terms of a will to ascertain whether or not it was the intention of the testator that either the whole or a part of such a bequest should be regarded as compensation for services to be rendered, evidence of the amount of commissions or other allowances that might have been awarded to the legatee by a court had the bequest not been made, would not afford a basis for an inference as to what part of the bequest, if any, was actually intended for compensation. The theory of the Government so far has been

that in every such case the testator gave the bequest *as* compensation because he was not satisfied with the compensation allowed by the courts.

Such proof could be of value only on the assumption that the courts must hold that whenever a bequest is made to an executor in lieu of commissions, the legacy will be regarded as income up to the largest amount that could possibly have been awarded to him in an accounting proceeding had he been appointed executor and no such bequest had been made to him.

Of course, to so hold would be, in effect, to read into the Income Tax Law a provision in substance that "income does not include property acquired by bequest except that so much of a bequest in lieu of commissions as equals the statutory commissions or other allowances the executor would have received had be fully administered the estate shall be deemed to be income;" and to read into the Estate Tax Law a provision that in such case a like amount shall be deemed to be an expense of administration. If that is what is desired it must be obtained from Congress.

In the third place, under the terms of Mr. Vanderbilt's Will, construed in accordance with long settled principles of law, the whole of the legacy to each of the executors of his will became payable in the ordinary course of the administration of his estate, at one time and upon one condition. It must be dealt with as a single item. To permit extrinsic evidence of any kind to be introduced to modify or in any manner affect the settled meaning of the language of the will, to allow proof that Mr. Vanderbilt actually intended that part of his single provision for any one of his beneficiaries should be payable upon one condition and part

of it upon another, that part of it was one thing and part of it was something else, would be to re-make, not to construe his will. That cannot be done by anybody. (*Reynolds v. Robinson*, 82 N. Y. 103, 107.)

CONCLUSION.

From whatever angle the case is approached, therefore, the single question in it is whether the legacies in question were as a matter of settled law "acquired by bequest," instead of derived from labor.

We submit that the decision of the Circuit Court of Appeals that they were so acquired and its decision that they were not so derived and so were not compensation are correct, and that its judgments should be affirmed.

October 1, 1923.

Respectfully submitted,

ROY C. GASSER,
WILLIAM HAYES,
Of Counsel for Respondents.

UNITED STATES v. MERRIAM.

UNITED STATES v. ANDERSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 67 and 68. Argued October 11, 12, 1923.—Decided November 12, 1923.

1. A bequest made to an executor, to be in lieu of all compensation or commissions to which he would otherwise be entitled as such, is upon an implied condition that he clothe himself in good faith with the character of executor, but its payment is not conditioned upon actual service in that capacity. P. 184.
2. Bequests of that kind were exempted from tax under the Income Tax Act of October 3, 1913, which taxes "the income from but not the value of property acquired by gift, bequest, devise or descent." *Id.*
3. Taxing statutes are not to be extended by implication beyond the clear import of the language used; and doubt as to the meaning of their words must be resolved against the Government and in favor of the taxpayer. P. 187.

282 Fed. 851, affirmed.

CERTIORARI to judgments of the Circuit Court of Appeals which reversed judgments recovered by the United States in the District Court in actions for additional income taxes.

Mr. Solicitor General Beck, with whom *Mr. Preston C. Alexander* and *Mr. Charles T. Hendler* were on the brief, for the United States.

"Bequest" as well in the terminology of the law as in its general acceptation implies a bounty or gratuity and not a payment; the term is donative and not compensative in its signification. Citing, general and legal lexicographers; Black. Com., (Chase's ed.) p. 609; Schouler on Wills, 5th ed., vol. 1, p. 3; Heaton, Surrogates' Courts, 3d ed., vol. 2, p. 1283; 40 Cyc. 994; *In re Hoover's Estate*,

7 N. Y. S. 283; *In re Daly's Estate*, 89 N. Y. S. 538; *Disston* v. *McClain*, 147 Fed. 114; *Reynolds* v. *Robinson*, 82 N. Y. 103. *Orton* v. *Orton*, 3 Keyes, 486, distinguished.

It is in such sense that "bequest" is used in the Act of 1913. It appears in the act immediately after the word "gift" and before the word "descent", and so, by the rule of *noscitur a sociis*, is to be defined as a gift by will, quite apart from the fact that such is its ordinary meaning. Congress manifestly used the words "bequest, devise, or descent" to mean property given by will or descending by statutes of distribution or descent, as distinguished from property passing for a consideration. The same subparagraph of the act provides that "compensation for personal services in whatever form paid" is taxable income within the act. Contrasting the word "bequest" with these words, should resolve the doubt if any exists. If what is received is "compensation," even though paid in the form of a bequest by will, it is nevertheless taxable income, *a fortiori* when the testator expressly characterizes the bequest as compensation. If, however, it is a donative bequest, as distinguished from "compensation", it is not taxable income.

The statute manifestly does not exempt from taxation income paid in the form of a bequest. The entire net income of the taxpayer is expressly made taxable under paragraph A. The words "but not the value of property received by gift, bequest, devise, or descent" merely point out what is not income. This legislative definition has since been confirmed in *Eisner* v. *Macomber*, 252 U. S. 189, and *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509. Under the definition of income given in those cases a bequest in the nature of a gift is not income, whereas compensation for personal services, though in the form of a bequest, is a gain derived from labor and hence income and clearly taxable under the act.

The bequests to the petitioners "in lieu of all compensation and commissions to which they would otherwise be entitled as executors or trustees" constitute "compensation for personal services" within the meaning of, and as such are taxable as income under, the Act of 1913.

In New York, at the time of decedent's death, compensation to executors and trustees was provided for by § 2753, Code Civ. Proc. In jurisdictions where statutory compensation is provided for, a testator may fix the compensation of his executor or trustee in an amount equal to, greater, or less than, that fixed by law. *Ireland* v. *Corse*, 67 N. Y. 343; *Secor* v. *Sentis*, 5 Redfield Surr. 570; *Connolly* v. *Leonard*, 114 Me. 29; *Lennig's Estate*, 53 Pa. Super. Ct. 596; 24 Corpus Juris, 989.

The respondents did not renounce the so-called bequests within the time limited, and no commissions have been allowed or paid to them, under § 2753, *supra*. Thus they have construed the bequests as testamentary compensation for their services as executors and trustees. If the bequests were not compensation, there would have been no necessity for the filing of renunciations. In that event, however, they would have received large sums by way of statutory commissions, but concedely no commissions were paid them. The reason, of course, is obvious. They were not entitled to commissions—not because by this direction of the testator they were to receive no compensation (*Matter of Vanderbilt*, 68 App. Div. 27), but because the bequests were given to the executors as compensation, and were so recognized by them.

Aside from the foregoing considerations, there can be no question that, under the authorities in this country, the amounts received by the respondents constitute compensation for the personal services to be rendered by them in their capacities of executors and trustees. *Matter of*

Tilden, 44 Hun, 441, 444; *Richardson* v. *Richardson*, 129 N. Y. S. 941; *Accounting of Mason*, 98 N. Y. 527; *O'Donoghue Estate*, 115 Misc. (N. Y.) 697; *Renshaw* v. *Williams*, 75 Md. 498; *Runyon's Estate*, 125 Cal. 195; *In re Hays's Estate*, 183 Pa. St. 296; *Sweatman's Estate*, 223 Pa. St. 552; *Connolly* v. *Leonard*, 114 Me. 29; *Sinnott* v. *Kenaday*, 14 App. D. C. 1; *Batchelder, Petitioner*, 147 Mass. 465; *Fletcher* v. *Hurd*, 14 N. Y. S. 388.

The cases cited in the court below in support of the contention that the bequests to petitioners were donative and not compensative,—*Morris* v. *Kent*, 2 Edw. Ch. 175; *Scofield* v. *St. John*, 65 How. Pr. 292; *Harrison* v. *Rowley*, 4 Ves. Jr. 212; *Angermann* v. *Ford*, 29 Beav. 349; *Lewis* v. *Mathews*, L. R. 8 Eq. 277; and *Brydges* v. *Wotten*, 1 Ves. and Beam. 134,—are distinguishable.

The cases relied upon by respondents are predicated upon the English rule that an executor is not legally entitled to compensation and that any amount given him by will is necessarily a gratuity. The office of executor in New York is not a gratuitous one. Code Civ. Proc., § 2753. The reason for the rule thus fails and with it the rule itself.

Mr. Roy C. Gasser, with whom *Mr. William H. Hayes* was on the brief, for respondents.

Mr. Justice Sutherland delivered the opinion of the Court.

These are actions brought by the United States against the respective defendants, to recover the amount of additional income taxes assessed against them under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166. The pertinent provisions of the statute are:

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding

calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of one per centum per annum upon such income. . . .

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent: . . ."

The taxes were assessed upon certain legacies bequeathed to the defendants by the will of the late Alfred G. Vanderbilt. The provisions of the will which give rise to the controversy are as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, Five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000); and to Howard Lockwood, One thousand dollars ($1,000)."

. . . . . .

"Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vander-

bilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will. . . . The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants qualified as executors and letters testamentary were duly issued to them prior to the commencement of these actions. The legacies were received by the respective defendants during the year 1915,—$250,000 by Merriam and $200,000 by Anderson.

Demurrers to the complaints were overruled by the District Court and judgments rendered against defendants. Upon writs of error from the Court of Appeals these judgments were reversed. 282 Fed. 851. The Government contends that these legacies are compensation for personal service within the meaning of paragraph B, quoted above.

The cases turn upon the meaning of the phrase which describes net income as "including the income from but not the value of property acquired by . . . bequest. . . ." The word "bequest" is commonly defined as a gift of personal property by will; but it is not necessarily confined to a gratuity. Thus, it was held in *Orton* v. *Orton,* 3 Keyes (N. Y.) 486, that a bequest of personal property, though made in lieu of dower, was, nevertheless, a legacy, the court saying: "Every bequest of personal property is a legacy, including as well those made in lieu of dower, and in satisfaction of an indebtedness, as those which are wholly gratuities. The circumstance whether gratuitous or not, does not enter into consideration in the definition. . . . And when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, 'a thing given, either as a gratuity or as a recompense."

Without now attempting to formulate a precise definition of the meaning of the word as used in this statute, or deciding whether it includes an amount expressly left as compensation for service actually performed, it is enough for present purposes to say that it does include the bequest here under consideration since, as we shall presently show, actual service as a condition of payment is not required. A bequest to a person as executor is considered as given upon the implied condition that the person named shall, in good faith, clothe himself with the character. 2 Williams on Executors (6th Am. ed.) 1391; *Morris* v. *Kent,* 2 Edwards Chancery, 175, 179. And this is so whether given to him simply in this capacity or for care and trouble in executing the office. *Idem.* And it is a sufficient performance of the condition if the executor prove the will or unequivocally manifest an intention to act. *Lewis* v. *Mathews,* L. R. 8 Eq. Cas. 277, 281; *Kirkland* v. *Narramore,* 105 Mass. 31, 32; *Scofield* v. *St. John,* 65 How. Pr. (N. Y.) 292, 294–296; *Morris* v. *Kent, supra; Harrison* v. *Rowley,* 4 Vesey, 212, 215.

In *Morris* v. *Kent, supra* (p. 179) it is said:

"A legacy to an executor even expressed to be for care and pains, is not to be regarded in the light of a debt or as founded in contract, or to be governed by the principles applicable to contracts. . . . When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question generally has been upon the sufficient assumption of the character to entitle the party to the same. The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the will with a bona fide intention to act under it or unequivocally manifest an intention to act in the executorship, as, for instance, by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office."

Decisions are cited in the Government's brief which, it is said, establish a contrary rule. These decisions, however, we are of opinion, are clearly differentiated from the case under consideration. Some of them are with reference to testamentary provisions specifically fixing the amount of compensation for services to be rendered while others deal with the question whether the executor is entitled to receive statutory compensation in addition to the amount named in the will. In *Matter of Tilden*, 44 Hun, 441, for example, the will directed that: "In lieu and exclusion of all other commissions and compensation to my executors for performing their duties under this will . . . I authorize them to receive from my estate the following commissions, namely:" The court, construing this provision, said: "The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum."

Again, in *Richardson* v. *Richardson*, 129 N. Y. S. 941, the will was interpreted as directing the payment of compensation. Especial stress was laid upon the fact that the will did not purport to "give" or "bequeath" to the executors the amounts fixed, and, adopting the language of the court in the *Tilden Case*, it was said that the provisions of the will were intended as an "'authority to charge for their services a certain sum.' The compensation provided by the will is not a legacy, and does not abate with the legacies, but is compensation, carefully determined by the testator and directed to be paid for the services to be rendered, and is therefore to be paid in full."

It is obvious that in this class of cases the right depends upon the actual performance of the service and the amount fixed is in no sense a legacy but is purely compensative.

In Renshaw v. *Williams*, 75 Md. 498, the court held that where a bequest had been made in lieu of commis-

sions in a sum larger than the commissions would amount to, it must be treated as full compensation for the entire administration of the estate by the same person, though part of it passed through his hands as administrator *pendente lite* and part as executor.

In *Connolly* v. *Leonard*, 114 Me. 29, a devise was made "in lieu of any payment for services as executor or trustee," with the provision that it was so to be accepted and understood. The court held that in view of this language, the executor was not entitled to commissions in addition to the property devised.

The foregoing are illustrative of the cases relied upon, and, apart from some general language, which we are unable to accept as applicable to the present case, none of them, in principle, is in conflict with the conclusion we have reached. The distinction to be drawn is between compensation fixed by will for services to be rendered by the executor and a legacy to one upon the implied condition that he shall clothe himself with the character of executor. In the former case he must perform the service to earn the compensation. In the latter case he need do no more than in good faith comply with the condition in order to receive the bequest; and in that view the further provision that the bequest shall be in lieu of commissions is, in effect, nothing more than an expression of the testator's will that the executor shall not receive statutory allowances for the services he may render.

The word "bequest" having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress. *Kepner* v. *United States*, 195 U. S. 100, 124; *The Abbotsford*, 98 U. S. 440, 444.

On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most

important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153. The rule is stated by Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122:

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." And see *Eidman* v. *Martinez*, 184 U. S. 578, 583.

We are of opinion that these bequests are not taxable as income under the statute, and the judgment below is

Affirmed.

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